COMMENTS

THE DEPORTATION OF LAWFUL PERMANENT RESIDENTS FOR OLD AND MINOR CRIMES: RESTORING JUDICIAL REVIEW, ENDING RETROACTIVITY, AND RECOGNIZING DEPORTATION AS PUNISHMENT

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I. Introduction 769
II. Legal History of Criminal Consequences in Immigration Law 778
A. The Historical Expansion of Grounds of Deportation 778
1. Crimes Involving Moral Turpitude (CIMTs) 779
2. Narcotics Offenses 780
3. Evolving Definition of "Aggravated Felony" 781
4. 1996 Laws: AEDPA and IIRIRA 781
B. Elimination of Judicial Review and Creation of Mandatory Deportation Statutes 782
C. Recent Holdings and What They Mean for the Future 784
III. Current State of the Law Concerning Immigration Consequences of Crime 786
A. Applicability and Consequences of Grounds of Inadmissibility 787
B. Conviction-Based Grounds 789

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1. Is it a Conviction? 789
2. Does the Conviction Trigger an Immigration Consequence? 792
C. Conduct-Based Grounds: "Reason to Believe" Offenses and Admission of Certain Criminal Activity 794
D. Effects of Conviction-Based and Conduct-Based Offenses 796
1. Aggravated Felonies 796
2. Crimes Involving Moral Turpitude (CIMTs) 799
3. Narcotics Offenses 801
4. Firearms Offenses 801
5. Family Violence Crimes 802
6. Miscellaneous Crimes 802
E. Crimes Committed By Juvenile: CIMTs and Juveniles 803
IV. Problems Caused by the Crime-Based Grounds of Inadmissibility and Deportability, and the Need for Discretionary Relief from Deportation in Current and Future Removal Cases 805
A. The Hunt for "Criminal Aliens" 806
B. Discretion and Relief 809
1. Systematic Elimination of Discretion by Trial Court Judges: The End of Judicial Recommendation Against Deportation (JRAD) .. 810
2. Limitations to Authority and Discretionary Relief Available to Immigration Judges 812
C. Unintended Consequences and Miscarriages of Justice 816
1. Deporting United States Military Veterans 816
2. Deporting Children Adopted From Abroad 820
3. Standing Alone Among First-World Nations: Deporting Lawful Permanent Resident Parents, Spouses, and Children of U.S. Citizens 822
4. The Need for Discretion 824
V. Extending the Constitution and Common Sense to Solve Problems Caused by Current Immigration Laws 828
A. Non-Citizen Aliens, Immigration Laws, and Limited Constitutional Protections 829
1. Crime, Non-Citizen Aliens, and the Constitution . 831
2. *Padilla v. Kentucky*: Hope for the Future? 835
3. If it Doesn't Walk Like a Civil Proceeding, Doesn't Swim Like a Civil Proceeding, and Doesn't Quack Like a Civil Proceeding 837

B. Ending Retroactivity and Statutes of Limitation for Removal 840
1. Creating Criminals and Ending Retroactivity 841
2. Statute of Limitations on Deportation of Legal Residents for Known Criminal Offenses 849
VI. Solutions 855
A. Policy 857
B. Restoring Old, Good Ideas 858
1. JRAD 858
2. Discretion for Immigration Judges 859
C. Implementing New, Good Ideas 862
1. Applying Constitutional Protections and the Prohibition Against Ex Post Facto Laws to Immigration Legislation 862
2. Fairness, Reason, and Retroactivity 863
3. "[T]hat word—I Do Not Think it Means What You Think it Means" 864
4. Statutes of Limitation on Deportation for Known Criminal Offenses 865

I. Introduction

> [W]e think it not improper to say that deportation[1] under the circumstances would be deplorable . . . . [H]e is as much our product as though his mother had borne him on American soil . . . . However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples . . . . [S]uch a cruel and barbarous result would be a national reproach.
>
> Judge Learned Hand, *United States ex rel Davis* (1926)[2]

Although two distinct and separate bodies of law, the areas of criminal law and immigration law nonetheless combine to create, for many noncitizen aliens, a high-stakes, poorly-defined, and ever-changing body of law. Immigration law is civil law;[3] thus, removal proceedings are not sub-

1. Although in common practice "deportation" and "removal" are used interchangeably, statutory language now uses "removal" rather than "deportation." *See* Calcano-Martinez v. INS, 533 U.S. 348, 350 n.1 (2001) (indicating a preference for referring to orders of removal rather than orders of deportation).

2. United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 631 (1926) (writing for the majority, Judge Learned Hand refused to deport a long-term lawful permanent resident).

3. Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952). Because immigration law is civil, retroactive application of laws creating grounds of deportability do not raise ex post facto concerns. *Id.* "[D]eportation [is not] punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law

ject to the same constitutional safeguards that would be guaranteed in criminal prosecutions.[4] This is despite the fact that, for many, the consequence of a crime on their immigration status has a far greater impact than the actual criminal penalty. Even for aliens who may escape deportation, merely admitting to past criminal conduct for which they were never convicted can have serious, permanent consequences.[5]

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Act are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.[6]

The law governing the effect of criminal activity on aliens is a hodgepodge of legislation and re-interpretations spanning over a century. Legislation is found in sources ranging from major immigration reform initiatives[7] to laws aimed at creating a "drug-free America."[8] All non-citizens in the United States are subject to removal and the consequences of im-

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with the policy of Congress is an accident." *Id.* Thus, ex post facto concerns do not apply to immigration law. *Id.*

4. Abel v. United States, 362 U.S. 217, 237 (1960). "[D]eportation proceedings are not subject to the constitutional safeguards for criminal prosecutions." *Id.*

5. *See* Immigration and Nationality Act (INA) § 316, 8 U.S.C. § 1427 (2006) (listing the conditions that allow the Attorney General to take custody of an alien, either on ground of deportability or grounds of inadmissibility). Among the consequences of criminal conduct is the inability of a lawful permanent resident to show the "good moral character" required to naturalize and become a U.S. citizen. 8 C.F.R. § 316.2(a)(7) (2011) (stating that a person eligible for admission to the United States "has been and continues to be a person of good moral character"). "Good moral character" is not defined and varies dramatically by jurisdiction and the interpreting agency; additionally, a conviction for an "aggravated felony" according to the expanded definition, presents a lifetime ban to showing "good moral character." For a discussion of aggravated felonies, see Parts II and III of this Comment.

6. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (opinion written by Chief Judge Kaufman).

7. Major legislation aimed at immigration reform can be found as early as 1891. Examples in order of passage include the: Immigration Act of 1891, ch. 551, 26 Stat. 1084; Immigration and Nationality Act of 1917, ch. 29, 39 Stat. 887; Emergency Quota Act of 1921, ch. 8, 42 Stat. 5 (repealed 1965); The Immigration and Nationality Act of 1952 (McCarran Act), ch. 477, 66 Stat. 163; Immigration Act of 1965 (Hart-Celler Act), Pub. L. No. 89-236, 79 Stat. 911; Immigration Reform and Control Act of 1986 (IRCA, Simpson-Mazzoli Act), Pub. L. No. 99-603, 100 Stat. 3359; Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978; Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009; USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

8. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5251, 102 Stat. 4181, 4309 (stating the U.S. government's goal of a "drug-free America" by 1995). The Anti-Abuse Drug Act of 1988 contains several provisions dealing with immigration, ranging from im-

migration law.[9] The phrase "non-citizens" describes a broad category of people—ranging from lawful permanent residents, including veterans of our armed forces and children adopted from abroad, to those who have entered without inspection and remain "undocumented."[10] Surprisingly, the immigration consequences for criminal conduct committed by lawful permanent residents or "Green Card holders" are often more severe than the consequences for aliens who entered illegally and remain unlawfully present; this effectively penalizes aliens lawfully admitted to the United States more harshly than those who entered without inspection.[11] Certain activity can also create grounds for denying admission to aliens seeking to enter the United States legally, even without conclusive proof or a conviction, and even for activity committed when the alien was a child.[12] More troubling, existing laws hinge the "loss of both property and life, or of all that makes life worth living"[13] on terms that have no definition,[14] assigns counter-intuitive meanings to others, and create new grounds of

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plementation of electronic documentation readers at the border to making significant changes to the Immigration and Nationality Act. *Id.* §§ 4604, 4469.

9. *See* INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006) (defining alien as a non-citizen).

10. "The term 'alien' means any person not a citizen or national of the United States." *Id.* Most provisions of the Immigration and Nationality Act (INA) make reference to "any alien." INA § 237, 8 U.S.C.§ 1227; Based on the provisions referring to "any alien," immigration law is applicable to any non-citizen regardless of his or her lawful permanent resident status, unless stated otherwise. In contrast, with minor exceptions, the INA does not apply to U.S. citizens, as they are not contained within the definition of "alien." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3).

11. INA § 237(a), 8 U.S.C. § 1227(a) (stating the grounds for deportability); INA § 212(a), 8 U.S.C. § 1182(a) (listing the grounds of inadmissibility).

12. *Infra* Part III of this Comment.

13. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

14. "Crime involving moral turpitude" is not defined in the INA or elsewhere, although courts have attempted to create their own definitions, without a great deal of uniformity or success. *See* Marmolejo-Campos v. Holder, 558 F.3d 903, 921 (9th Cir. 2009) ("Overall, the BIA's precedential case law regarding the meaning of the phrase 'crime involving moral turpitude' is a mess of conflicting authority."). Although the statute provides a long list of factors that discredit "good moral character," no definition of the term is provided that would indicate or necessitate a finding of "good moral character." *See* INA § 101(f), 8 U.S.C. § 1101(f) (indicating what will *prevent* the finding of "good moral character," but not expressly defining the term). The definition of "crime of violence" is less than clear. *See* 8 U.S.C. § 16 (focusing on the term "physical force" as the guideline for determining what a "crime of violence" constitutes). The term "aggravated felony" does not require the offense to be "aggravated" nor to be a "felony" to meet the definition. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). This topic is discussed at greater length in Part II and III of this Comment. "Conviction" is defined in such a way that deferred adjudications, expunged offenses, and vacated pleas may still be considered "convictions." INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); *infra* Part III. "Admission" is defined to not only be dependent upon the lawful entry of a returning lawful permanent resident, but additionally upon various factors that may have occurred in the United States before his

removal based on conduct committed more than a half century ago.[15] There is no statute of limitations governing when removal proceedings must be initiated, and often proceedings are not brought until many years after the incident triggering them is committed.[16] Unfortunately, courts find that these delays in proceedings do not to give rise to estoppel arguments,[17] except where the actions of the government constitute affirmative misconduct that prejudiced the alien.[18] Trial judges adjudicating criminal matters have been divested of a long-standing discretionary power to make recommendations against deportation of non-citizen defendants.[19] The result has been an explosion in the number of aliens facing deportation in removal hearings, with a current estimated backlog of nearly 300,000 cases to be handled by only 272 immigration judges[20]—a task one immigration judge likened to "holding death penalty cases in traffic court."[21] In addition to the increased workload for immigration proceedings, Kumar Kibble, Deputy Director, Immigration and Customs

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departure, or during his trip abroad. INA § 101(a)(13), 8 U.S.C § 1101(a)(13); *infra* Part III, note 112.

15. Changes to immigration law creating inadmissibility and deportability for offenses or conduct committed before the passage of the legislation creating the ground of removability or excludability have been upheld for more than 100 years. This topic is discussed at greater length in Part V of this Comment.

16. Biggs v. INS, 55 F.3d 1398, 1401 (9th Cir. 1995). "Deportation in fact has no statute of limitations." *Id.; see* Asika v. Ashcroft, 362 F.3d 264, 268 (4th Cir. 2004) (indicating that it is permissible to rescind an adjustment of status, per prosecutorial discretion, within five years according to statute); Costa v. INS, 233 F.3d 31, 38 (1st Cir. 2000) ("There is no set time . . . for initiating a deportation proceeding[.]"); *In re* S., 9 I&N Dec. 548, 553 (B.I.A. 1962) ("[A]n alien who upon entry acquires the status of an alien lawfully admitted for permanent residence is nevertheless subject to deportation at any future time, or exclusion if he seeks to reenter the United States after departure, for conduct preceding his acquisition of that status.").

17. *See* INS v. Miranda, 459 U.S. 14, 18–19 (1982) (finding that an eighteen month delay in processing plaintiff's application for lawful permanent residency did not estop the action); Montana v. Kennedy, 366 U.S. 308, 314–315 (1961) (stating that the failure to issue a passport to a pregnant mother did not estop government from denying citizenship to the child born in Italy); Robertson-Dewar v. Holder, 646 F.3d 226 (5th Cir. 2011) (determining that an eleven-year delay in adjudicating plaintiff's naturalization application did not estop removal).

18. *See* Mendoza-Hernandez v. INS, 664 F.2d 635, 639 (7th Cir. 1981) (holding that the "Petitioner must show that the Service's conduct amounted to affirmative misconduct").

19. This topic is discussed at greater length in Part IV of this Comment.

20. Stephanie Gleason, *Number of Pending US Immigration Cases Climbs- Report*, WALL ST. J., June 7, 2011, http://online.wsj.com/article/BT-CO-20110607-712358.html.

21. Editorial, *Our Overloaded Immigration Courts,* L.A. TIMES, Feb. 22, 2010, http://articles.latimes.com/2010/feb/22/opinion/la-ed-aba22-2010feb22 (quoting Dana L. Marks, an immigration judge in San Francisco and the president of the Nat'l Assn. of Immigration Judges).

Enforcement stated that: "It costs approximately $12,500 to arrest, detain, and remove an individual from the United States."[22]

The Department of Homeland Security (DHS) Office of Immigration Statistics (OIS) estimates that 169,000 convicted criminal aliens were removed in 2010.[23] Of these, 105,085 were for convictions in the three top categories of offense: drug offenses, immigration offenses, and criminal vehicular-traffic offenses.[24] According to Human Rights Watch, of those persons deported for criminal offenses between 1997 and 2007, seventy-two percent were deported for committing non-violent crimes, and another fourteen percent were deported for offenses that had the potential to cause harm but did not.[25] Immigration and Customs Enforcement (ICE)[26] reportedly exercises prosecutorial discretion in selecting the aliens against whom it seeks to initiate removal proceedings;[27] but when ICE does pursue prosecution, immigration judges are frequently unable to exercise any form of judicial discretion, having been stripped in large

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22. *Hearing Before the Subcomm. on Immigration Policy and Enforcement of the Comm. of the Judiciary,* 112th Cong. 80 (2011) (statement of Kumar Kibble, Deputy Director, Immigration and Customs Enforcement). When legal expenses to the government are included, this expense is actually estimated at $25,553 per final order of removal. U.S. Dep't of Justice, *What Does it Cost to Regulate Immigration? Three Measurements to Calculate Costs,* Immigr. Litig. Bull., July 2011, at 7. This topic is discussed at greater length in Part V of this Comment.

23. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS 2010, at 4 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf [hereinafter IMMIGRATION ENFORCEMENT ACTIONS]

24. *Id.*

25. HUMAN RIGHTS WATCH, ESTIMATED NUMBER OF FAMILY MEMBERS SEPARATED BY DEPORTATION (2009), *available at* http://www.hrw.org/sites/default/files/related_material/forced_apart_charts_final.pdf.

26. Immigration and Customs Enforcement (ICE) is the agency within the Department of Homeland Security charged with enforcement of immigration laws. *About ICE*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited Feb. 4, 2012).

27. *See* Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to All Field Office Directors, Special Agents in Charge, and Chief Counsels (June 21, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [hereinafter Memorandum from John Morton] (discussing the exercise of prosecutorial discretion consistent with the civil immigration enforcement priorities of the agency for the apprehension, detention and removal of aliens). The Board of Immigration Appeals (BIA) has held, in repeated decisions, that the choice by ICE to initiate proceedings or not involves an exercise of prosecutorial discretion not subject to review by either the immigration judge or the BIA. *In re* Bahta, 22 I&N Dec. 1381, 1391–92 (B.I.A. 2000); *In re* G-N-C-, 22 I&N Dec. 281, 284 (B.I.A. 1998); *In re* Ramirez-Sanchez, 17 I&N Dec. 503, 505 (B.I.A. 1980); *In re* Marin, 16 I&N Dec. 581, 589 (B.I.A. 1978); *In re* Geronimo, 13 I&N Dec. 680, 681 (B.I.A. 1971).

part of this ability through changes to legislation over the past twenty years.[28] Thus, in these cases, deportation effectively becomes mandatory.

As this Comment will discuss, the effects of current crime-based grounds of removal are most egregious when applied to deportation of lawful permanent residents. Sometimes a lawful permanent resident faces removal immediately after his arrest or his release from law enforcement custody, but oftentimes nothing happens for many years and removal proceedings are not initiated until he leaves the country and seeks to re-enter or applies to naturalize. The crimes triggering deportation of lawful permanent residents are often minor offenses, but are lumped together with far more serious crimes by overly broad categories.[29]

There are many examples that highlight the overly broad nature of the crimes that can effect deportation, many involving adults who came to the United States as children. In 2001, Alexander Christopher was deemed mandatorily removable as an "aggravated felon" under the immigration definition for committing a misdemeanor shoplifting crime.[30] Applying the current immigration law, the court ruled that the suspension of his sentence was "irrelevant," noting that the expanded immigration definition of "aggravated felony" was "breaking the time-honored line between felonies and misdemeanors."[31] Another example is the story of Joao Herbert. Herbert was adopted from Brazil by an Ohio couple when he was eight-years-old, but never naturalized, and remained subject to deportation.[32] In the summer following his high school graduation, Herbert was arrested and given probation for selling a bag of marijuana.[33] He was allowed a twenty-one-minute visitation with his parents before being mandatorily deported.[34] Unable to speak fluent Portuguese and adapt to

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28. Adam Collicelli, Note, *Affording Discretion to Immigration Judges: A Comparison of Removal Proceedings in the United States and Canada,* 32 B.C. INT'L & COMP. L. REV. 115, 117 (2009).

29. The definition of an "aggravated felony" has grown considerably since its creation in 1988 at which time it included only murder, narcotics trafficking and firearms trafficking; it now includes many more and many less serious crimes. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006). This topic is discussed at greater length in Parts II and III of this Comment.

30. United States v. Christopher, 239 F.3d 1191, 1191–92 (11th Cir. 2001).

31. *Id.* at 1194.

32. Kevin G. Hall, *After Arrest, U.S. Sent Ohio Man To Brazil And Death: Joao Herbert Was Deported From His Adoptive Home for a First-Offense Drug Case,* ORLANDO SENTINEL, May 30, 2004, http://articles.orlandosentinel.com/2004-05-30/news/0405300027_1_brazil-herbert-notorious.

33. Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2593 (2001).

34. *Id.*

Brazilian culture, Herbert was shot to death in the slum where he lived after being cast from the United States.[35]

Zak Ashenhurst, a thirty-five-year-old native of England, came to the United States as a lawful permanent resident in 1979 at the age of six.[36] When he was seventeen, he was fined for firing a gun into an empty swimming pool—an offense for which he was deported to England in 2008, almost twenty years after the incident occurred.[37] Similarly, in 2007, Edward Lloyd Johnson, a Jamaican citizen, was arrested a second time for "turnstile jumping" or boarding a subway without paying the fare.[38] Even though he had been a lawful permanent resident for twenty-five years, Johnson was charged as deportable, placed in removal proceedings, and detained.[39] He was finally released from detention in February of 2011, when the government ceased pursuing his case.[40] At the time of Johnson's release, he had been detained for more than three years.[41]

Another case involves Muhammad Zahid Chaudhry, a thirty-six-year-old Pakistani who joined the Army National Guard in 2001 and was placed into active duty where he sustained an injury in training that confined him to a wheelchair.[42] After voluntarily disclosing on his naturalization application that he had paid fines for misdemeanor convictions in Australia more than ten years earlier Chaudhry faces deportation.[43] On January 12, 2011 the immigration court refused to stay the proceeding and Chaudry's fate now hangs in the balance.[44] While recent ICE memoranda indicate that the agency will consider prior military and National Guard service as a factor in determining whether to pursue removal pro-

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35. Hall, *supra* note 32.

36. *UK Man Faces Deportation From the United States for 18 Year Old Crime*, EMIGRATE.CO.UK (Aug. 18, 2008), http://www.emigrate.co.uk/news/281342.html.

37. Katie Norman, *Welsh Dad Faces Deportation over 18-Year-Old Crime,* WALESONLINE.CO.UK (Aug. 9, 2008), http://www.walesonline.co.uk/news/wales-news/2008/08/09/welsh-dad-faces-deportation-over-18-year-old-crime-91466-21501187/; Katie Norman, *Dad in USA Prison Nightmare,* WALESONLINE.CO.UK (Aug. 8, 2008), http://www.walesonline.co.uk/news/wales-news/2008/08/08/dad-in-usa-prison-nightmare-91466-21492146/.

38. Johnson v. Holder, 413 Fed. App'x 435, 435 (3d Cir. 2010).

39. *Id.*

40. Order of the Court, *Johnson*, 413 Fed. App'x 435 (No. 09-3478).

41. *Id.*

42. Phil Ferolito, *Former Guard Soldier Fighting Deportation: Muhammad Chaudhry Says Honesty is Costing Him His Dream to Live in the United States,* THE REGISTER-GUARD (Eugene, Or.), Nov. 2, 2009, http://special.registerguard.com/csp/cms/sites/web/news/sevendays/22430865-35/story.csp.

43. *Id.*

44. Adam Ashton, *Ex-Solider in Lacey Fights Deportation to Pakistan*, THE NEWS TRIBUNE (Tacoma, Wash.), Jan. 13 2011, http://www.thenewstribune.com/2011/01/13/1500290/immigrant-can-stay-for-now-but.html.

ceedings against a particular alien;[45] activist groups estimate 3,000 veterans are currently in removal proceedings and many more have already been deported.[46] In a statement Alison Parker, Deputy Director of the U.S. Program at Human Rights Watch said:

> We have to ask why, in a time of fiscal crisis, significant immigration enforcement funds are being spent on deporting legal residents who already have been punished for their crimes. Many of these people have lived in the country legally for decades, some have served in the military, others own businesses. And often, they are facing separation from family members, including children, who are citizens or legal residents.[47]

According to the DHS Office of Immigration Statistics a total of 1,042,625 persons became lawful permanent residents of the United States in 2010,[48] adding to an estimated 21,160,000 persons already in lawful permanent resident status as of January 1, 2010.[49] Non-immigrant aliens residing legally in the United States accounted for an additional 1.8 million persons.[50] As of January 2010, figures also indicate a population of 10.8 million aliens residing in the United States without authorization.[51] The Pew Research Center has estimated that this population of more than thirty-one million non-citizens comprised 12.8 percent of the

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45. Memorandum from John Morton, *supra* note 27.

46. It is difficult to determine the exact numbers of veterans currently facing deportation, but activist groups estimate that 3000 veterans are currently in removal proceedings. *See* Alex DiBranco, *Stop the Deportation of Immigrant Military Veterans,* CHANGE.ORG (Mar. 14, 2010), http://www.alternet.org/module/printversion/146030 (recognizing that there are "hundreds or even thousands . . . [of immigrant veterans being] shipped back and forth to their birth country"). "As of May 2010, there were 16,966 non-citizens on active duty." Juliana Barbassa, *Immigrant Vets Face Deportation,* CHARLESTON DAILY MAIL, Oct. 25, 2010, at 3A. This topic is discussed in greater detail in Part IV of this Comment.

47. *US: Deportation Splits Families,* HUMAN RIGHTS WATCH (Apr. 15, 2009), http://www.hrw.org/en/news/2009/04/15/us-deportation-splits-families.

48. RANDALL MONGER & JAMES YANKAY, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS 2010, at 1 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf.

49. According to these figures, asylees and refugees were also included in the numbers of legal permanent residents. *Id.* at 3; MICHAEL HOEFER, ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., POPULATION ESTIMATES: ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES JANUARY 2010, at 3 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf [hereinafter POPULATION ESTIMATES].

50. POPULATION ESTIMATES, *supra* note 49, at 3.

51. *Id.*

total U.S. population in 2009,[52] all of whom remain subject to immigration law and removal.

Deportation, however, does not just affect the person removed. This enormous population must also be considered in the context of the number of U.S. citizens with non-citizen immediate family members. In 2009, twenty-three percent of children seventeen and younger born in the United States—more than seventeen million children—had at least one non-citizen parent.[53] Human Rights Watch estimates that between 1997 and 2007, 1,012,734 people in the United States lost an immediate family member to deportation;[54] these numbers are likely much higher today given the dramatic increase in the number of annual removals.

This Comment will address, in Part II, the evolution of our immigration laws relating to criminal activity, including a brief discussion of the expansion of grounds for which removability and inadmissibility can be established as well as the restriction and elimination of powers of judicial and executive discretion to halt removals. Part III will examine the current state of immigration law as it applies to aliens accused of criminal activity. Part IV examines the extreme effects caused by the elimination of a trial-court judge's discretion to recommend against removal and halt removal proceedings of lawful permanent residents in deserving cases. This part will also advocate for restoration of these discretionary powers and examine the increase in deportations since 1996 and consequences of that enforcement. Part V discusses constitutional rights as they are applied to lawful permanent residents facing removal for criminal activity and how recent case law may lead to change. This part will also discuss the policy reasons behind ending retroactivity in immigration law which creates deportability for criminal conduct and will propose a statute of limitations for the commencement of removal proceedings following a conviction that triggers deportability. Finally, Part VI summarizes proposed solutions for eliminating the backlog of removal cases before our immigration courts, reducing future cases and restoring discretion necessary to ensure reasonable and fair treatment of lawful permanent residents and their families.

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52. JEFFREY S. PASSEL & PAUL TAYLOR, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 3 (2010), *available at* http://pewhispanic.org/files/reports/125.pdf.

53. PEW HISPANIC CTR., *8% of US Kids Born to Illegal Immigrants, tbl. 2* (Aug. 12, 2010), http://www.marketingcharts.com/topics/demographics/8-of-us-kids-born-to-illegal-immigrants-13856/pew-immigrant-parent-status-number-childrenjpg/.

54. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 4 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us0409webwcover_0.pdf [hereinafter HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS)].

II. Legal History of Criminal Consequences in Immigration Law

> While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.
>
> Justice Stevens, *Padilla v. Kentucky* (2010)[55]

Over time, the criminal grounds for which an alien can be denied entry to the United States, as well as the grounds for which an alien in the United States can be removed, have expanded enormously. Simultaneously, the power of judges, the Attorney General, state governors and the President to exercise discretion in order to stay these removals has been severely limited and, in some cases, eliminated altogether. Because most crimes are charged under state penal codes, the overlay of federal immigration laws can create extreme and anomalous results that are inconsistent with Congressional intent. All of these topics are discussed in greater detail *infra* Parts II, III, IV and V of this Comment.

A. *The Historical Expansion of Grounds of Deportation*

Criminal-conviction and criminal-conduct based grounds for restricting immigration and the rights of immigrants to remain in the United States are not new; although they have expanded dramatically in recent decades. An early limitation came in 1875 when Congress passed legislation creating grounds on which to exclude convicts and prostitutes from entry into the United States.[56] Over time, the class of excluded persons expanded and grounds of deportability were created which allowed the removal of aliens already in the United States.[57]

Under current laws, aliens ordered to be removed are barred from future admission into the United States for a specified statutory period—ten years if the alien has been removed once or twenty years in the case of a second or subsequent removal.[58] For aliens designated as "aggravated felons" under the expanded immigration definition, removal results in a lifetime bar to future admission to the United States.[59] Under certain circumstances, permission may be obtained from the Attorney Gen-

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55. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1478 (2010).

56. Act of 1875, ch. 141, 18 Stat. 477 (restricting entrance of destitute persons, criminals, and prostitutes).

57. Immigration and Nationality Act, ch. 29, 39 Stat. 874 (1917).

58. INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii) (2006).

59. *Id.*

eral to return before the statutory period is complete, however, this permission is discretionary and difficult to obtain.[60] Even if such permission is granted, the alien must still establish eligibility for a visa, which may be impossible.

1. Crimes Involving Moral Turpitude (CIMTs)

In 1891, Congress created legislation to exclude persons "convicted of a felony or other infamous crime or misdemeanor involving moral turpitude";[61] but sixteen years later, Congress expanded the excluded class of persons to include those who merely *admitted* to having committed the elements of a crime involving moral turpitude (CIMT).[62] What Congress failed to do, and what the courts have largely failed to do since, was adequately define what constitutes a CIMT.[63]

The year 1917 marked the creation of crime-based grounds of deportability for conduct committed within the United States. The Immigration and Nationality Act of 1917 established grounds of deportability for aliens sentenced to imprisonment for one year or more for a conviction of a CIMT committed within five years of entry to the United States, as well as for aliens having committed two or more CIMTs at any time after entry.[64] This law continues to bar aliens, who admit to having com-

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60. INA § 212 (a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii); INA § 242 (a)(2)(A)(iii), 8 U.S.C., § 1252(a)(2)(A)(iii).

61. Immigration Act of 1891, ch. 551, 26 Stat. 1084 (revising the 1882 Immigration Act).

62. Act of 1907, ch. 1134, 34 Stat. 898. Additional legislation affecting immigrants mandated that a woman with U.S. citizenship who married an immigrant lost her citizenship unless her husband naturalized. Expatriation Act of 1907, ch. 2534, 34 Stat. 1228. Perhaps not unconstitutional, Congress's intent in the creation of the 1907 crimes involving moral turpitude (CIMT) legislation has been the subject of debate at the highest levels.

> It has not been contended, and the majority does not now hold, that there is a constitutional impediment to the deportation of an alien who is convicted of the commission of two crimes involving moral turpitude, regardless of his citizenship status at the time the crimes were committed. The question in this case is whether §§ 241 and 340 of the Immigration and Nationality Act of 1952 [Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (8 U.S.C. 1101 et seq.)] manifest a congressional intent to achieve such a result. I find the Court's decision inconsistent with the language of the statute, with its history and background, and with any reasonable purpose which can be ascribed to Congress in enacting it.

Costello v. INS, 376 U.S. 120 (1964).

63. "Crime involving moral turpitude" is not defined in the Immigration and Nationality Act (INA) or elsewhere, although courts have made attempts to create their own definitions without a great deal of uniformity or success. One definition is "conduct which is base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *In re* Franklin, 20 I&N Dec. 867 (B.I.A. 1994). *Infra* Part III.

64. Immigration and Nationality Act, ch. 29, 39 Stat. 874 (1917).

mitted the elements of a CIMT, from entering the United States. Aliens already in the United States, including lawful permanent residents, can face deportability, decreased immigration relief options, and the inability to naturalize for convictions deemed to be CIMTs.[65]

2. Narcotics Offenses

Immigration consequences for controlled substance offenses began in 1922 when certain narcotics violations were added as a special category of crimes triggering deportation.[66] Initially, the legislation was interpreted to suggest that a narcotics offense also had to be a CIMT for an individual to be deportable.[67] But it was subsequently held that a narcotics offense did not need to constitute a CIMT to be a deportable offense[68] and was, instead, a separate category of deportable offense.[69] Today, aliens can be inadmissible based on a conviction or even a mere *admission* of violating any controlled substance law, including personal usage,[70] and a lawful permanent resident convicted of any controlled substance violation, outside of one conviction for possession of thirty grams of marijuana, is deportable.[71] Because the statute refers to violations "relating to" controlled substances, it also reaches inchoate offenses including attempt, possession of paraphernalia, and actual usage.[72] Certain statutes also provide for the exclusion of aliens that the government "has reasonable grounds to believe" have been involved in trafficking controlled substances and other crimes; thus since no admission or conviction is

65. *Id.* A frequent issue concerns the exclusion of those who have committed CIMTs. Many European countries whose citizens can travel to the U.S. without a tourist visa under the Visa Waiver Program (VWP) are unaware that old convictions expunged under rehabilitative statutes in England continue to present a ground of excludability despite being effectively "expunged" in the country where the conviction occurred. For example, the Uniform Rehabilitation of Offenders Act erases a conviction after a period of years without a reconviction of the same type of offense. Rehabilitation of Offenders Act 1974, c. 53 (Eng. & Wales), *available at* http://www.legislation.gov.uk/ukpga/1974/53.

66. Narcotic Drug Act of 1922, ch. 202, 42 Stat. 596.

67. Weedin v. Moy Fat, 8 F.2d 488, 489 (9th Cir. 1925) (holding that an individual who committed narcotics offense was not deportable because the narcotics offense did not involve moral turpitude).

68. Chung Que Fong v. Nagle 15 F.2d 789, 790 (9th Cir. 1926).

69. United States *ex rel.* Grimaldi v. Ebey, 12 F.2d 922, 923 (7th Cir. 1926) ("An examination of the act of 1922 convinces us that the Congress was dealing particularly with the deportation of aliens who violated the Narcotic Act. It was a special enactment, dealing with a particular class of offenders, or rather offenders who committed a particular kind of a crime.").

70. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2006).

71. INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B).

72. *See* Luu-Le v. INS, 224 F.3d 911, 916 (9th Cir. 2000) (finding that a violation "relating to" controlled substance should be broadly construed).

required, almost anything can provide such a ground, including an arrest after which charges were not pursued or a charge that was later dismissed.[73]

3. Evolving Definition of "Aggravated Felony"

> [W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.
>
> Circuit Judge Duniway, *Yuen Sang Low v. Att'y Gen.*, (1973)[74]

Among the more perplexing issues in immigration law is the ever-changing definition of "aggravated felony." The Anti-Drug Abuse Act of 1988 (ADAA) defined "aggravated felony," to include only the crimes of murder, narcotics trafficking, and trafficking in firearms.[75] Subsequent legislation, however, broadened the definition in 1990[76] and again in 1994[77] to include both more serious and less serious crimes. Contrary to what the name suggests, the definition was expanded to include crimes that are neither aggravated, nor felonies,[78] yet nonetheless expose the alien to the severe consequences of being an "aggravated felon."

4. 1996 Laws: AEDPA and IIRIRA

> [In] the Immigration Law of 1996 . . . people were defined as felons in a new way. They were picked up off the streets in the middle of the night, deported without any due process—and these were legal people, here legally, but may have committed some crime, even shoplifting 20 or 30 years ago.[79]
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> Rep. Bob Filner, (D-Cal.) (2003)

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73. INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C); Nunez-Payan v. INS, 815 F.2d 384, 384 (5th Cir. 1987).

74. Yuen Sang Low v. Att'y Gen., 479 F.2d 820, 821 (9th Cir. 1973).

75. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181.

76. Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 5048 (modifying the definition of "aggravated felony" to include an analysis of the sentence imposed to determine whether a crime constituted an "aggravated felony").

77. Immigration and Nationality Technical Correction Act of 1994, Pub. L. No.103-416, 108 Stat. 4305 (expanding the definition of "aggravated felony" to include less serious crimes including theft, fraud, etc.).

78. Anti-Drug Abuse Act of 1988.

79. HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 34 (2007), *available at* http://www.unhcr.org/refworld/publisher,HRW,USA,46a764862,0.html [hereinafter HUMAN RIGHTS WATCH, FORCED APART].

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[80] and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[81] combined to have enormous and long-ranging effects on immigration law. Among the effects is the definition of "aggravated felony" now found in the Immigration Nationality Act (INA) at Section 101(a)(43).[82] Although the definition contains twenty-one sub-sections[83] describing offenses that are to be considered "aggravated felonies," the actual crimes that can be classified under this broad category is far from clear. This counter-intuitive definition also creates a separate ground of deportation for crimes fitting within its vague description.[84] Sentence length had, previously been included as a key factor in the determination of whether a crime is an "aggravated felony", but the 1996 legislation lowered the determining threshold from a five-year sentence to only one year for most crimes,[85] which allowed the definition of "aggravated felony" to include many more crimes categorized as misdemeanors by state penal codes. In addition, IIRIRA broadened the definition of "conviction" and "sentence" to apply to any reference of imprisonment or sentence, regardless of any deferred adjudication, probation, suspension, or expungement.[86]

B. *Elimination of Judicial Review and Creation of Mandatory Deportation Statutes*

> To banish [an immigrant] from home, family, and adopted country is punishment of the most drastic kind . . . .
>
> Justice Black, *Lehmann v. United States ex rel. Carson* (1957)[87]

In order to mitigate the steep consequences of the grounds of deportability, Judicial Recommendation Against Deportation (JRAD) allowed sentencing judges in both state and federal prosecutions to make a binding recommendation "that such alien shall not be deported."[88] Cre-

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80. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214.

81. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

82. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006).

83. *Id.*

84. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii.).

85. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

86. *Id.* at § 101(a)(48)(A); *In re* Marroquin-Garcia, 23 I&N Dec. 705, 705 (B.I.A. 2005); *In re* Salazar-Regino, 23 I&N Dec. 223, 223 (B.I.A. 2002); *In re* Roldan-Santoya, 22 I&N Dec. 512, 512 (B.I.A. 1999).

87. Lehmann v. United States *ex rel.* Carson, 353 U.S. 685, 691 (1957).

88. Janvier v. INS, 793 F.2d 449, 453 (1986). before it was amended by IMMACT 90, 8 U.S.C. Section 1251(b) provided that "§ 1251(a)(4) is inapplicable if the sentencing

ated as part of the Immigration and Nationality Act of 1917,[89] JRAD discretionary relief from deportation was severely curtailed when the 1952 INA eliminated the availability of JRAD relief for narcotics offenses.[90] Nearly forty years later in 1990, JRAD was eliminated completely,[91] leaving trial judges presiding over criminal cases unable to prevent non-citizen defendants from being placed in removal proceedings.[92]

The reforms of 1990 also reduced the ability of immigration judges to grant discretionary relief to persons categorized as "aggravated felons," thus as the definition of that term expanded and placed a greater number of people into removal proceedings, available methods to avoid removal were concurrently decreased.[93] Under AEDPA in 1996, relief from deportation for "aggravated felons" was eliminated completely.[94] Significantly, IIRIRA also applied the new definition of "aggravated felony" retroactively.[95] With the discretion of immigration judges to halt deportation extinguished, lawful permanent resident aliens, found to have committed "aggravated felonies," had no statutory relief left, thus when such cases were brought for prosecution, removal became mandatory.

The 1996 changes even went as far as to remove the ability of the President and state governors to pardon grounds of deportability based on

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judge, either at the time of sentencing or within 30 days thereafter, and after giving due notice to the appropriate authorities, recommends against deportation . . . ." *Id.* at 451.

89. Immigration and Nationality Act of 1917, 39 Stat. 889–90.

> That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.

Id.

90. The Immigration and Nationality Act of 1952 (McCarran Act), ch. 477, 66 Stat. 163, 218–19.

91. Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978, 5050.

92. Although bound by the penal codes of the state, judges are still able to sentence defendants in such a manner that removability can be avoided, provided they are properly advised of the immigration consequences of various criminal dispositions.

93. Immigration Act of 1990 (IMMACT 90), 104 Stat. at 5052. This included changes to discretionary relief in the form of the 212(c) waiver, suspension of deportation, voluntary departure, asylum, and withholding of deportation. *Id.*

94. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214, 1277.

95. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 3009–628. "The term [aggravated felony] applies regardless of whether the conviction was entered before, on or after the date of enactment." *Id.*

narcotics and firearms crimes.[96] IIRIRA also created a new process called "expedited removal" which allows low-level Customs and Border Protection (CBP) or ICE officers to make a determination that an alien seeking to enter the United States has made a misrepresentation and order the alien removed without a hearing before a judge or any further review.[97] Similarly, an additional provision allows the removal of an alien incarcerated within the United States to be removed pursuant to an order issued by DHS without a hearing before a judge or any additional review.[98] The 1996 legislation also required that removal orders be reinstated for aliens previously removed who once again entered the United States, regardless of reason.[99] Furthermore, the legislation prevented the prior order from being reviewed or reopened, which renders an alien unable to apply for immigration relief even if the individual would be otherwise eligible.[100] IIRIRA limited the ability of federal courts to review orders of removal, and nine years later, the REAL-ID Act of 2005 completely eliminated the ability of federal district courts to review removal orders through habeus corpus petitions.[101]

C. *Recent Holdings and What They Mean for the Future*

> The scope of our review under this standard is "narrow"; as we have often recognized, a court is not to substitute its judgment for that of the agency. Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore. But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking [sic]. When reviewing an agency action, we must assess, among other matters, whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. That

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96. *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006) (failing to allow for presidential or gubernatorial pardons). Ironically, a pardon by the President or governor can waive a ground of deportability caused by an "aggravated felony" or a CIMT, but if the underlying crime is also a narcotics offense or firearms offense, the pardon does not waive that ground of deportability and thus the recipient remains deportable. *Id.* Thus a pardon can remove deportability for CIMTs, aggravated felonies, high-speed flight, and multiple criminal convictions, but not grounds of deportability and inadmissibility for crimes involving firearms, domestic violence and narcotics. *In re* Yuen, 12 I&N Dec. 325, 325 (B.I.A. 1967).

97. INA § 235(b)(l)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2006).

98. INA § 238(a)(l), (b), 8 U.S.C. § 1228(a)(1), (b).

99. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5).

100. *Id.*; Fernandez-Vargas v. Gonzales, 548 U.S. 30, 45–47 (2006); Ojeda-Terrazas v. Ashcroft, 290 F. 3d 292, 301–02 (5th Cir. 2002).

101. INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D); *see* REAL-ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (indicating that after REAL-ID, review of removal orders through habeas corpus is handled via petition for review by federal appellate courts).

> task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons. The BIA has flunked that test here.
>
> Justice Kagan, *Judulang v. Holder* (2011)[102]

The seventeen years that have passed since IIRIRA and AEDPA were enacted represent one of the longest periods of time that have passed without significant immigration reform since the 1880s.[103] Recent Supreme Court holdings seem to be calling for Congressional re-consideration of immigration laws, especially in areas in which criminal law intersects with immigration regulation. The 2010 holding of *Padilla v. Kentucky*[104] and the 2011 holding of *Judulang v. Holder*[105] appear to be significant signs of a move away from unfettered expansion of excludability and deportability as well as on-going restriction or elimination of review and relief. *Padilla* held that because of the "severity of deportation," criminal defense counsel must advise non-citizen defendants about the potential immigration consequences of a plea of guilty, especially where deportation will be nearly "automatic" as in the case of crimes constituting "aggravated felonies."[106] And importantly, the Court in *Padilla* recognized that removal is more accurately viewed as a "penalty" than a "collateral consequence" of a criminal conviction.[107] This recognition may give rise to future arguments based on ex post facto, equal protection, and other constitutional grounds. Equally as important, the Court in *Judulang* struck down a long-standing BIA rule that limited relief from deportation of a lawful permanent resident to cases where the crime committed would also present a ground of inadmissibility if committed by a non-resident; this "arbitrary and capricious" BIA practice of requiring a near-exact "statutory analogue" had disallowed the application of this relief in cases where the applicable ground of deportability was phrased in such a way as to include more or fewer crimes than those encompassed by the analogous ground of inadmissibility, even if the specific crime committed still fell within both.[108] These decisions and others

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102. Judulang v. Holder, 565 U.S. __, 132 S. Ct. 476, 483–84 (2011) (internal quotations and citations omitted).

103. *See supra* note 7 and accompanying text (describing the history of immigration reform since 1891 as well as the lack of significant change since the passage of IIRIRA).

104. 559 U.S. __, 130 S. Ct. 1473 (2010).

105. 565 U.S. __, 132 S. Ct. 476 (2011).

106. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1486 (2010).

107. *Id.* at __, 130 S. Ct. at 1480 (holding "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the *penalty* that may be imposed on non[-]citizen defendants who plead guilty") (emphasis added).

108. Judulang v. Holder, 565 U.S. __, 132 S. Ct. 476 (2011). Another significant recent case in this area of law is Carachuri-Rosendo v. Holder, 560 U.S. __, 130 S. Ct. 2577, 2579 (2010) (ruling that a lawful permanent resident was not be an "aggravated felon" for com-

recognize the currently chaotic state of immigration law in this area and give reason to be hopeful that more meaningful change may be on the horizon.

III. Current State of the Law Concerning Immigration Consequences of Crime

> [A] carelessly drafted piece of legislation[, IIRIRA] has improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors.
>
> Judge Becker, *United States v. Graham* (1999)[109]

> [T]his bill [AEDPA] . . . makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents . . . .
>
> President Bill Clinton (1996)[110]

After a long and complicated evolution, most law concerning immigration consequences of criminal activity can be sorted into two occasionally overlapping categories: conduct-based and conviction-based. These consequences most commonly appear in the form of either grounds of deportability or grounds of inadmissibility, but can also give rise to other immigration consequences.[111]

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mitting two misdemeanor drug offenses in Texas). There, the Court held that a second or subsequent misdemeanor conviction on a simple drug possession charge is not an "aggravated felony" when the conviction is not based on a prior conviction; furthermore, by avoiding the "aggravated felony" designation, aliens falling into this category are still removable, but qualify to apply for discretionary relief for which "aggravated felons" are ineligible. In that case, the plaintiff's first offense was possession of a small amount of marijuana for which he received twenty days in jail; and the second was possession of one Xanax tablet without a prescription for which he received ten days in jail following a conviction not based upon recidivism or the first conviction. *Id.* at __, 130 S. Ct. 2583. This is a significant step away from a snowballing definition of "aggravated felony" that has swept away many aliens who are guilty of neither an "aggravated" offense nor a "felony."

109. United States v. Graham, 169 F.3d 787, 788 (3d Cir. 1999).

110. Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 720 (Apr. 24, 1996).

111. In addition to rendering a non-citizen alien ineligible for various forms of immigration relief, a finding that he has committed a crime will also frequently render him unable to show "good moral character" for a period of years; a showing of "good moral character" is necessary to naturalize. *See* 8 C.F.R. § 316.2 (2011) (listing the requirements for naturalization).

A. *Applicability and Consequences of Grounds of Inadmissibility*

Grounds of deportability are generally thought to apply to aliens already within the United States who could be deported. Grounds of inadmissibility are similarly described as applying to those intending immigrants who are seeking entry to the United States and thus may be found "inadmissible." While this distinction is generally true, post-IIRIRA grounds of inadmissibility can also apply to lawful permanent residents seeking to return to their homes in the United States after traveling outside the country.[112] Significantly, this change causes lawful permanent residents—who have committed certain crimes that would not

112. Before 1996, the Supreme Court held that when a lawful permanent resident returned to the United States after an absence that was "innocent, casual, and brief" in nature, his return would not be considered an "entry" as defined in INA § 101(a)(3), INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A), and thus, the grounds of inadmissibility would not apply. Rosenberg v. Fleuti, 374 U.S. 449, 462–63 (1963). After 1996 (post-IIRIRA), the Board of Immigration Appeals (BIA) ruled that *Fleuti* no longer applied to determine whether a lawful permanent resident returning to the United States after travel abroad has been "admitted." *In re* Collado-Munoz, 21 I&N Dec. 1061, 1061 (B.I.A. 1998). This determination is now governed by an amended INA § 101(a)(3), INA § 101(A)(13)(C), 8 U.S.C. § 1101(a)(13)(c), which holds that a lawful permanent resident will be considered to be applying for admission to the United States if he has: (a) been determined to have abandoned his lawful permanent resident status, (b) travelled abroad for 180 days or more, (c) committed a crime while outside the United States, (d) committed a crime in the United States codified under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), before leaving to travel abroad, (e) left the United States while in removal proceedings, or (f) entered the United States without inspection. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C). Because any alien seeking admission to the United States is always subject to inspection and possible detention, by considering returning lawful permanent residents as applicants for admission, rather than the *Fleuti* view that they were in most cases not seeking admission, a greater number were therefore subject to detention. After *Collado-Munoz*, the grounds of inadmissibility were applied to lawful permanent residents regardless of when they committed the triggering act or offense. In a holding that surprised many scholars, the Supreme Court on Mar. 28, 2012, refused to apply INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) retroactively, meaning that where the predicating act or offense occurred before the effective date of IIRIRA, Apr. 1, 1997, the *Fleuti* holding still protected a lawful permanent resident returning from a trip abroad from being considered to be applying for admission. Vartelas v. Holder, No. 10-1211, 565 U.S. __, 2012 WL 1019971 (Mar. 28, 2012). This means that for many lawful permanent residents, pre-IIRIRA crimes will no longer trigger their removal where the act exists only as a ground of inadmissibility and not as a ground of deportability, such as the commission of a single CIMT more than five years after admission, or a single conviction for possession of 30 grams or less of marijuana because both of these offenses constitute grounds of inadmissibility, but not grounds of deportability. *See* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2). The *Vartelas* holding is further significant because "arriving aliens" are not entitled to hearings to determine whether they may be released on bond. 8 C.F.R. § 1003.19(h)(2)(i)(B). Thus by no longer classifying returning lawful permanent residents with pre-IIRIRA crimes as arriving aliens applying for admission, many will now avoid prolonged detention where the act committed could still constitute a ground of deportability.

otherwise trigger deportability—to become subject to the grounds of inadmissibility if they travel abroad after commission of the offense.[113] This expansion of the applicability of the grounds of inadmissibility means that lawful permanent residents who return to the United States and are found to be inadmissible are also subject to detention, sometimes mandatorily, and do not have a right to be released on bond pending a hearing to determine their immigration-fate.[114] Under these expansions,

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113. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (including crimes such as CIMTs, narcotics offenses, drug trafficking, prostitution or committing multiple crimes).

114. INA § 236(c), 8 U.S.C. § 1226(c). Among the most troubling provisions of current immigration law, affecting lawful permanent residents and other non-citizen aliens, are those requiring mandatory detention through the pendency of their purportedly civil removal case. The concept of mandatory detention, as with other aspects of immigration law, has seen its application expand dramatically at the same time discretion and options for fighting one's case while released on bond have been markedly cut-back or in some cases eliminated altogether. When the 1988's ADAA created the definition of "aggravated felony" for immigration purposes—originally pertaining only to murderers, narcotics traffickers and firearms traffickers—it also created a provision requiring these non-citizen alien's mandatory detention, without possibility of posting bond, during the pendency of their cases. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4181 (amending INA § 242(a), 8 U.S.C. § 1252(a)).

Interestingly, ADAA also expanded JRAD to apply to "aggravated felonies," a topic discussed at greater length in Part IV of this Comment. Two years later, IMMACT 90, which eliminated JRAD, also included a provision that allowed lawful permanent residents to avoid mandatory detention and instead post a bond while their removal cases progressed. IMMACT 90 added "(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978, 5049–50. Although this was interpreted as a presumption against bond for lawful permanent residents charged with deportability for commission of an "aggravated felony", the presumption was rebuttable. *In re* De La Cruz, 20 I&N Dec. 346 (B.I.A. 1991) (finding that the amended INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) created "a rebuttable presumption against the release of any alien convicted of an aggravated felony from Immigration and Naturalization Service custody unless the alien demonstrates that he is an alien lawfully admitted for permanent residence, is not a threat to the community, and is likely to appear for any scheduled hearings"). The Antiterrorism and Effective Death Penalty Act (AEDPA) removed the ability of a lawful permanent residents to rebut the presumption against mandatory detention following an "aggravated felony," which is now codified as the mandatory detention provision in § 1226(c)(1). INA § 236(c)(l), 8 U.S.C. § 1226(c)(1) (2006). This mandatory detention provision was challenged but upheld in 2003, when the Supreme Court overturned both the district court and the Ninth Circuit Court's finding that it was unconstitutional to mandatorily detain a lawful permanent resident. Demore v. Kim, 538 U.S. 510, 510 (2003). Writing for the 5-4 majority, Chief Justice Rehnquist found that detention without possibility of bond "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. That these lawful permanent residents had, in almost all cases, been granted bond as they

many long-term lawful permanent residents, who have previously travelled without issue, suddenly find themselves detained and facing removal as inadmissible aliens when they return from more recent trips abroad.

B. *Conviction-Based Grounds*

1. Is it a Conviction?

Some, but not all, grounds of inadmissibility and deportability are based upon a conviction entered by a court, either in the United States or abroad.[115] What constitutes a "conviction," however, is debatable. After

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fought the underlying criminal charges giving rise to their removal was left unaddressed by the Court's decision. As the law stands today, non-citizen aliens, including lawful permanent residents, may be detained while in the United States if they are charged as deportable for having committed an "aggravated felony," a single CIMT with a sentence of a year or more in confinement, two CIMTs regardless of sentence, a narcotics offense (or even narcotics abuse or addiction not resulting in a criminal conviction), or a firearms offense. A lawful permanent resident returning from a trip abroad may be mandatorily detained for an even wider array of offenses, including those listed above, as well as a single CIMT outside the "petty offense exception," a domestic violence, prostitution and multiple convictions resulting in an aggregate sentence of imprisonment of more than five years. Interestingly, if the alien is not charged with deportability on the ground justifying mandatory detention but he is found to have committed an offense which would justify his removal, he may still be mandatorily detained. *In re* Kotliar 24 I&N Dec. 124 (B.I.A. 2007).

Although an immigration judge is unable to grant a bond to a non-citizen alien subject to mandatory detention, the alien may request a hearing to determine if the mandatory detention provision has been correctly applied in his case—this is generally known as a "Joseph Hearing." *See In re* Joseph, 22 I&N Dec. 660 (B.I.A. 1999) (Joseph I); *In re* Joseph, 22 I&N Dec. 799 (1999) (Joseph II). In addition to *Joseph*, another BIA decision held that the mandatory detention provision of INA § 236(c)(l), 8 U.S.C. § 1226(c)(1) is only applicable when the alien's release from custody came after Oct. 8, 1988, the date of the end of the Transition Period Custody Rules. *In re* Adeniji, 22 I&N Dec. 1102, 1130 (B.I.A. 1999). Recent case law has modified *Adeniji* to limit mandatory detention further to apply only to those aliens who committed an offense triggering mandatory detention after that date. *In re* Garcia-Arreola, 25 I&N Dec. 267 (B.I.A. 2010). Thus, an alien who commits a deportable offense, which triggers mandatory detention on or before Oct. 8, 1998, and is later confined again for an offense which would not trigger removal, remains deportable for the pre-1998 offense, but is not mandatorily detainable. However, for those aliens, including lawful permanent residents, who are found to be mandatorily detainable, the period of detention can be longer than any period of incarceration they may have served for the underlying crime. Despite lengthy periods of detention being upheld for many years, a recent Circuit opinion has found that when such detention without bond becomes "unreasonable" the Fifth Amendment is violated—possibly setting the stage for limits to mandatory detention in the future. *See* Diop v. ICE/Homeland Sec., 656 F.3d 221, at 223 (3rd Cir. 2011) (vacating the dismissal of Diop's habeas petition). However, what "reasonable" is remains to be determined, as the opinion "decline[d] to establish a universal point at which detention will always be considered unreasonable." *Id.* at 233.

115. INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A).

IIRIRA, "conviction" has been defined at INA § 101(a)(48)(A) as requiring two elements. First, a judge or jury must have found the non-citizen alien to be guilty, the alien himself must have pleaded guilty or nolo contendere, or the alien must have admitted to facts sufficient to warrant a finding of guilt; and second, the judge must have ordered some type of "punishment, penalty, or restraint" of the alien's liberty.[116] Most forms of post-conviction relief which "erase" convictions for other purposes do not do so in the immigration context; however, this can depend on the exact wording of the state's statute at issue, creating inconsistent results around the country. In most cases, deferred adjudications[117] and ameliorative or rehabilitative expungements[118] remain convictions for

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116. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Id.

117. Under the post-IIRIRA definition of conviction, the first element is satisfied even when a court withholds an actual finding of guilt, as with many states' deferred adjudication regimes, as long as sufficient facts have been admitted to warrant a finding of guilt. In Texas, the BIA held that deferred adjudication is a conviction. *In re* Punu, 22 I&N Dec. 224, 224 (B.I.A. 1998) (overruling a pre-IIRIRA holding which held deferred adjudication to not constitute as a conviction for immigration purposes). Case law has supported this finding for deferred adjudications in other states with similar statutory regimes. *See* Batrez-Gradiz v. Gonzales, 490 F.3d 1206 (10th Cir. 2007) (holding that a Wyoming deferred adjudication was a conviction for immigration purposes where a deferred entry of plea and deferred sentence was imposed under Wyo. Stat. Section 7-13-301, which reads: "Without entering a judgment of guilt or conviction, [the court may] defer further proceedings and place the person on probation for a term not to exceed five (5) years").

In contrast, a finding of guilty for a "violation," as opposed to a misdemeanor, under Oregon law was found by the BIA not to constitute a conviction for immigration purposes. *In re* Eslamizar, 23 I&N Dec. 684, 684 (B.I.A. 2004). Additionally, an informal deferral by the prosecutor should not constitute a conviction for immigration purposes since the defendant does not generally make an admission of guilt as a condition of such an arrangement. Convictions where a non-citizen alien is found "guilty but mentally ill" have also been found to constitute "convictions" for immigration purposes and have served as the basis for deportation. *See* Salim v. Reno, No. CIV. A. 2000-CV-4603, 2000 WL 33115910, at *1, *3 (E.D. Pa. Jan. 16, 2001) (noting "the statutory history of the INA shows that Congress meant to define 'conviction' broadly enough to encompass a GBMI [guilty but mentally ill] judgment").

118. Expungements resulting from rehabilitative statutes or those that are issued solely to avoid immigration consequences are nonetheless recognized as convictions for immigration purposes. *In re* Pickering, 23 I&N Dec. 621, 624 (B.I.A. 2003). In 1999, the BIA refused to recognize any "state action, whether it is called setting aside, annulling, vacating, cancellation, expungement, dismissal, discharge, etc. of the conviction that purports to erase the record of guilt of the offense pursuant to a state rehabilitative statute";

immigration purposes. Convictions expunged or vacated for constitutional or procedural defects within the criminal proceedings will, in some cases, cease to have immigration consequences.[119] As the law stands

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thus finding that such convictions continued to have immigration consequences. *In re* Roldan-Santoya, 22 I&N Dec. 512, 520 (B.I.A. 1999). In the case of first-time narcotics offenses, this issue resulted in a split among the circuits for several years. The Ninth Circuit initially refused to apply *Roldan-Santoya* to cases where a non-citizen alien was convicted of an offense that would have qualified for treatment under the Federal First Offender Act (FFOA), but who had his conviction expunged under state or foreign law, holding that such expunged convictions could not form the basis for deportation. Lujan-Armendariz v. INS, 222 F.3d 728, 735 (9th Cir. 2000).

> The First Offender Act is a limited federal rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases. The Act allows the court to sentence the defendant in a manner that prevents him from suffering any disability imposed by law on account of the finding of guilt. Under the Act, the finding of guilt is expunged and no legal consequences may be imposed as a result of the defendant's having committed the offense. The Act's ameliorative provisions apply for all purposes.

Id. The *Lujan-Armendariz* court noted that under the FFOA, the court is allowed to sentence a first-time narcotics offender in such a way "that prevents him from suffering *any* disability imposed by law on account of the finding of guilt" and that "[t]he Act's ameliorative provisions apply for *all* purposes." *Id.* After more than ten years, the Ninth Circuit overruled this decision in the interest of unanimity among the circuits. Nunez-Reyes v. Holder, 646 F.3d 684, 689 (9th Cir. 2011). Now holding that a first-time narcotics conviction that has been expunged under state law now can form the basis of a deportation, the court did choose to apply its decision prospectively, affecting only convictions entered on July 15, 2011 or later. *Id.* at 690. It is also important to note that even within the Ninth Circuit, the holding of *Lujan-Armendariz* applies only to certain first-time narcotics offenses before the date of the holding in *Nunez-Reyes,* and not to other types of convictions expunged under ameliorative statutes at any time. *In re* Marroquin-Garcia, 23 I&N Dec. 705, 716 (B.I.A. 2005) (an expunged firearms conviction remained a conviction for immigration purposes).

119. The BIA found that a conviction vacated based on defects with the legal merits of the criminal conviction did not continue to have immigration consequences. *In re* Rodriguez-Ruiz, 22 I&N Dec. 1378 (B.I.A. 2000). Where the expungement was performed by a foreign court and no reason was stated for the action, a minimum of a "reasonable basis" is required to determine that the expungement had been done for immigration purposes. Pickering v. Gonzales, 465 F.3d 263, 267–68 (6th Cir. 2006). However, this view was refined in 2007, placing the burden upon the alien to show that an expungement was not performed solely to avoid immigration consequences of the conviction. *In re* Chavez-Martinez, 24 I&N Dec. 272, 272 (B.I.A. 2007). *Padilla v. Kentucky* held that criminal defense attorneys must advise non-citizen clients of potential immigration consequences to pleading guilty to crimes, therefore, the BIA recognized that convictions vacated for failure of the court to admonish non-citizen defendants as to potential immigration as required by state law renders those convictions null for immigration purposes. *In re* Adamiak, 23 I&N Dec. 878, 881 (B.I.A. 2006). BIA decisions do not create precedent binding upon the circuit courts. *Compare In re* Adamiak, 23 I&N Dec. at 878 (failing to advise non-citizen of rights rendered the BIA decision void), *with* Renteria-Gonzalez v. INS, 322 F.3d 804 (5th

now, a pardon by a state governor or even the President of the United States can serve only to prevent the pardoned conviction from serving as a ground for deportability for certain specified crimes.[120] Notably absent from the list of enumerated offenses are drug crimes and domestic violence.[121] In some cases, post-conviction sentence modification may be effective in avoiding a conviction for immigration purposes or to eliminate an "aggravated felony" ground of deportability. This remains true even when the sentence reduction has been done solely to avoid an immigration consequence.[122]

2. Does the Conviction Trigger an Immigration Consequence?

If a crime has resulted in a conviction under immigration law, it must still be decided if that conviction constitutes a ground of deportability as an "aggravated felony," a CIMT, a narcotics offense, a firearms offense, a domestic violence offense, or some other immigration consequence. The method for making this important determination is both complicated and has been the subject of recent change. Until 2008, before an immigration judge could determine if a conviction fell within a proscribed ground of deportability, he would first determine which test should be applied to the instant case—the strict categorical approach or the modified categorical approach—[123] and what documents he could consider in his evalua-

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Cir. 2002) (holding that all convictions remain valid in the immigration context, regardless of the reasons for which they were set aside). Despite this, the Fifth Circuit later adopted the BIA's approach in *Discipio v. Ashcroft*. Discipio v. Ashcroft, 417 F.3d 448 (5th Cir. 2005).

120. INA § 237(a)(2)(5)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (2006) (creating relief from removal for specifically enumerated offenses "if the alien subsequent to the conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States . . . "). The BIA specifically found that the executive pardon provision applies only to those listed offenses and that "no 'implicit' waivers should be read into the statute." *In re* Suh, 23 I&N Dec. 626, 626 (B.I.A. 2003).

121. Additionally, where a crime presents more than one ground of deportability, such a pardon may waive some grounds, but a removal may still be based on other grounds, which survive the pardon. *See id.* at 628.

122. The BIA differentiated between a post-conviction sentence modification in which a sentence was reduced *nunc pro tunc* and an expungement. *See In re* Cota-Vargas, 23 I&N Dec. 849 (B.I.A. 2005) (holding that, where a sentence is modified *nunc pro tunc* specifically to avoid an immigration consequence, the immigration court and BIA must recognize and give effect to the modified sentence); *In re* Song, 23 I&N Dec. 173 (B.I.A. 2001) (revising the sentence to less than a year alleviates the aggravated felon status from non-citizen's record).

123. An immigration judge will first apply the "strict categorical approach," an abstract analysis which limits consideration to only the statutory definition of the criminal offense, as compared to what minimum conduct is necessary to trigger the applicable ground or consequence; actual details of the respondent's particular actions cannot be considered. If all possible violations of the particular criminal statute would necessarily trigger

tion.[124] The strict categorical approach limits the immigration judge to analysis of the criminal statute only, whereas and the modified categorical approach also allows examination of documents within the record of conviction.[125]

The Board of Immigration Appeals (BIA) previously accepted the categorical approaches as being the appropriate methods of determining applicability of the grounds of deportability and other immigration consequences.[126] Despite this, recent case law has implemented a different standard in some cases, which has expanded the analysis to include "non-elemental facts" when determining whether various offenses qualify as "aggravated felonies" in some cases.[127] When determining if a crime

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the ground of deportability in question, then a conviction under the particular statute will categorically trigger removal; however, if it would be possible to violate the criminal statute without conduct that would fall within the applicable ground of deportability, the statute is said to be "divisible." *See In re* Sweetser, 22 I&N Dec. 709, 714 (B.I.A. 1999) ("Where a statute under which an alien was convicted is divisible, we look to the record of conviction . . . This approach does not involve an inquiry into facts previously presented and tried. Instead the focus is on the elements required to sustain the conviction."). It is worth noting, however, that the Supreme Court required that there be a "realistic possibility" that the criminal statute could include conduct falling outside the ground of deportability, and not merely a wild hypothetical instance. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). When determining whether a conviction under a divisible statute triggers an immigration consequence, immigration judges will then apply the modified categorical approach, which allows consideration of the record of conviction in addition to the abstract analysis of the categorical approach. *Id.* at 186–87.

124. Documents that are considered "in the record" are limited, but include at least the charging documents, any plea agreement, the plea colloquy transcript, and the verdict or judgment of conviction. 8 C.F.R. § 1003.41 (2011) (providing a non-exhaustive list of documents that may be admissible as evidence in an immigration proceeding to substantiate the existence of a conviction). The regulation also notes that "[a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof [is admissible]." *Id.* at § 1003.41(d).

125. Significantly, the modified categorical analysis still constrains the immigration judge to the record of conviction, and does not allow an examination of the respondent's crime outside those documents. Once a respondent's conviction is determined to fall within a divisible statute, the burden is on the alien to show that his conduct does not trigger the applicable immigration consequence, unlike criminal court where the burden remains with the state. The burden is also on the respondent to provide documents contained within the record of conviction, provided the judge's request is reasonable. *In re* Almanza-Arenas, 24 I&N Dec. 771 (B.I.A. 2009).

126. *In re* B., 21 I&N Dec. 287 (B.I.A. 1996) (noting "we look to the statutory definition, not the underlying circumstances of the crime to make the determination").

127. The BIA differentiated between (a) grounds of deportability which focus entirely on the actual elements of the conviction, and (b) grounds of deportability that instead include factors "not tied to the elements of any State or Federal criminal statute." *In re* Babaisakov, 24 I&N Dec. 306, 309 (B.I.A. 2007). The former continues to require a categorical analysis; however, post-2007, the latter allows an inquiry beyond the strict categorical and modified categorical approaches into evidence outside of the record of conviction

constitutes a CIMT, a controversial holding now allows the immigration judge to look behind the record of conviction to "any" evidence.[128] Since immigration proceedings are not bound by the Federal Rules of Evidence, evidence such as hearsay is routinely admitted[129] making this new development potentially very dangerous.

C. *Conduct-Based Grounds: "Reason to Believe" Offenses and Admission of Certain Criminal Activity*

Although conviction-based grounds of deportability and inadmissibility are broader, conduct-based grounds of inadmissibility still substantially affect non-citizen aliens. Conduct-based grounds of inadmissibility do not require a conviction to render the non-citizen alien inadmissible.[130]

Certain statutes allow consular and immigration officers to determine that an alien is inadmissible based upon nothing more than a "reason to believe" that the alien has, or intends to, engage in proscribed conduct, regardless of the lack of actual proof, conviction, or even an admission—

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to determine whether "non-elemental" factors have been met for an alien to qualify as an "aggravated felon." This approach has been used to find such aggravating factors for the purposes of qualifying a non-citizen alien as an aggravated felon as well as whether the loss to the victim exceeded $10,000 and whether a prostitution offense was "committed for commercial advantage." *Id.* at 312; *In re* Gertsenshteyn, 24 I&N Dec. 111, 111 (B.I.A. 2007). Thus far, the "non-elemental" inquiry into facts outside the record of conviction has not been applied to non-"aggravated felony" grounds of deportability. *In re* Velazquez-Herrera, 24 I&N Dec. 503, 516–17 (B.I.A. 2008).

128. When determining whether a conviction of a crime qualifies as a CIMT, immigration courts have historically applied the categorical approach and the "reasonable probability" requirement referenced in *Gonzales v. Duenas-Alvarez*. Gonzales v. Duenas-Alvarez, 549 U.S. at 193. This was changed in 2008 in *In re Silva-Trevino*, in which the Attorney General changed the CIMT analysis as performed in an immigration context. *In re* Silva-Trevino, 24 I&N Dec. 687, 687 (B.I.A. 2008). After *Silva-Trevino*, immigration judges and the BIA must now make a three-part inquiry into whether a conviction constitutes a CIMT, first applying the strict categorical approach, then the modified categorical approach, and finally allowing analysis of "any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question," regardless of whether such evidence appears in the record of conviction. *Id.* Despite this dramatic departure from the categorical approach, several Circuits have since found that, regardless of *Silva-Trevino,* the categorical approach is the appropriate method of determining whether a conviction constitutes a CIMT. *See* Prudencio v. Holder, No. 10-2382, slip op. (4th Cir. Jan. 30, 2012) (rejecting the holding of *Silva-Trevino*), Fajardo v. U.S. Att'y Gen., 659 F.3d 1303 (11th Cir. 2011) (rejecting the holding of *Silva-Trevino*), Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010) (rejecting the holding of *Silva-Trevino*); Jean-Louis v. Att'y Gen., 582 F.3d 462, 470–73 (3d Cir. 2009) (rejecting the holding of *Silva-Trevino*).

129. *In re* Devera, 16 I&N Dec. 266, 266 (B.I.A. 1977).

130. *See* INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (2006) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable."). A conviction is not required to support deportability on this ground. *Id.*

such as where an officer finds a "reason to believe" an alien intends to engage in narcotics trafficking,[131] alien smuggling,[132] or money laundering.[133] A catch-all ground allows for the exclusion of an alien when a consular officer finds a "reasonable ground to believe" he intends to enter the United States "solely, principally, or incidentally" to commit *any* unlawful activity.[134] No waiver exists for this ground of inadmissibility and there is no method of appeal of the consular officer's determination.[135]

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131. A frequently applied ground exists to render an alien inadmissible where an officer has a "reason to believe" the alien is a narcotics trafficker, or has committed any inchoate offense associated with narcotics trafficking. INA § 212(a)(2)(C)(i), 8 U.SC. § 1182(a)(2)(C)(i). Additionally, an immediate relative of a person reasonably believed to be a drug trafficker who themselves benefitted financially from said drug trafficking within the last five years is also inadmissible if the relative should have reasonably known of the source of the funds. INA § 212(a)(2)(C)(ii), 8 U.S.C. § 1182(a)(2)(C)(ii).

132. Where officers find a "reason to believe" an alien has engaged in alien smuggling or associated inchoate offenses, the alien is inadmissible, as are immediate relatives who have financially benefitted from the offense. *See* INA § 212(a)(2)(H), 8 U.S.C. § 1182(a)(2)(H). An exemption exists for sons and daughters who financially benefitted from human trafficking by their parents where the children were themselves minors at the time of the benefit. *Id.* Such an exemption does not apply to minor children who financially benefitted from narcotics offenses, effectively rendering children of drug traffickers inadmissible regardless of age. *Id.*

133. A slightly narrower statute finds an alien inadmissible where there is a reason to believe he intends to engage in money laundering, but does not extend to inchoate offenses. INA § 212(a)(2)(I)(i), 8 U.S.C. § 1182(a)(2)(I)(i).

134. INA § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A). In addition to the enumerated unlawful activity of sabotage, espionage, overthrow of the government and illegal export of technology, this ground has also been used to find aliens believed to be members of organized crime inadmissible—since December 2007, this has been extended to aliens "determined" to be members of street gangs in Mexico, Honduras, El Salvador and Guatemala. 9 FAM 40.31 N5.3(b). The Foreign Affairs Manual (FAM), which provides guidance for consular officers, recognizes that determining membership is not always straightforward, noting that "membership in the organization must be inferred from the totality of the information available." 9 FAM 40.31 PN1.3. The FAM provides a non-exhaustive list of factors to be considered to make such a membership determinations, including "[f]requent association with other members," "[v]oluntarily displaying symbols of the organization," and "[p]articipating in the organization's activities, even if lawful." *Id.* Despite the imprecise method of determining an alien's membership, the FAM notes, "applying INA § 212(a)(3)(A)(ii), 8 U.S.C. § 1182(a)(3)(A)(ii) to members of organized criminal societies makes it a de facto permanent ground of ineligibility." 9 FAM 40.31 N5.3(b). With increasing frequency, this ground of inadmissibility is being applied to render inadmissible immigrant visa applicants with tattoos from the specified Latin American countries. Geri Kahn, *It Only Takes a Tattoo,* CAL. IMMIGR. LAW. BLOG (June 24, 2009), http://www.californiaimmigrationlawyerblog.com/2009/06/it_only_takes_a_tatoo.html.

135. According to the U.S. Department of State, eighty-two applicants for immigrant visas were found inadmissible on this ground in fiscal year 2010 and none were able to overcome the finding. U.S. DEP'T OF STATE, TABLE XX: IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES (BY GROUNDS FOR REFUSAL UNDER THE IMMIGRATION AND

Aliens may also be found inadmissible for admitting to having committed—or simply admitting to having committed—the "essential elements" of crimes involving moral turpitude (CIMTs) and narcotics offenses, as well as inchoate offenses connected to these crimes, even where no conviction or other evidence exists to support such a finding.[136]

D. *Effects of Conviction-Based and Conduct-Based Offenses*

1. Aggravated Felonies

As discussed in Part II of this Comment, the definition of "aggravated felony"[137] for immigration purposes has expanded over time to include an increasingly wide array of crimes, while recent legislation has reduced and eliminated judicial discretion to halt removal on this ground. Lawful permanent residents who have been convicted of an "aggravated felony" at any time following admission are deportable.[138] Conviction of an "aggravated felony" after November 29, 1990, the date IMMACT 90 went into effect, also permanently prevents an alien from showing good moral character,[139] a requirement for naturalization.[140] This means that a lawful permanent resident, who would otherwise be eligible to apply for U.S. citizenship and no longer be subject to deportation, can never naturalize if he has been convicted of an "aggravated felony" under the expanded definition. As discussed earlier, there is no statute of limitations during which the government must initiate removal proceedings.[141] A waiver of deportability exists for certain aggravated felonies for certain pleas made

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NATIONALITY ACT) FISCAL YEAR 2010 (n.d.), *available at* http://www.travel.state.gov/pdf/FY10AnnualReport-TableXX.pdf.

136. INA § 212(a)(2)(l)(i), 8 U.S.C. § 1182(a)(2)(I)(i) (2006). Recognizing the potential for abuse in this application for ground of inadmissibility, the BIA held in *In re J.* that the following criteria must be met to allow admission of a crime to give rise to an immigration consequence under this section:

> (1) It must be clear that the conduct in question constitutes a crime or misdemeanor under the law where it is alleged to have occurred. (2) The alien must be advised in a clear manner of the essential elements of the alleged crime or misdemeanor. (3) The alien must clearly admit conduct constituting the essential elements of the crime or misdemeanor and that he committed such offense. By the latter is meant that he must admit the legal conclusion that he is guilty of the crime or misdemeanor. (4) It must appear that the crime or misdemeanor admitted actually involves moral turpitude, although it is not required that the alien himself concede the element of moral turpitude. (5) The admissions must be free and voluntary.

In re J., 2 I&N Dec. 285, 288 (B.I.A. 1945).

137. The definition of "aggravated felony" can be found at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

138. INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006).

139. 8 C.F.R. § 316.10(b)(ii) (2011).

140. *Id.* § 316.2(a).

141. Biggs v. INS, 55 F.3d 1398, 1401 (9th Cir. 1995).

before April 1, 1997;[142] however, removal of the ground of deportability does not "erase" the conviction for other purposes, including showing good moral character.[143] No waiver exists for aggravated felonies committed after that date and immigration judges have no discretion to halt deportations initiated on this ground.

It is easy to determine whether some criminal offenses can be considered aggravated felonies under the expanded definition, but other enumerated "aggravated felonies" are somewhat more vague. Particularly problematic is that any "crime of violence" for which the term of imprisonment exceeds one year is an "aggravated felony".[144] Although "crime of violence" is defined, the definition is vague to a degree causing a substantial debate in the courts as to its meaning.[145] Circuits debated whether DWI offenses constituted "aggravated felonies" as crimes of violence for years[146] until the matter was finally resolved in the negative by the Supreme Court.[147] The answer did not come until many hundreds of lawful permanent residents and other aliens were deported on that very

142. 8 C.F.R. § 1212.3.

143. *See In re* Balderas, 20 I&N Dec. 389 (B.I.A. 1991) (holding that the grant of a discretionary waiver does not act as an expungement of a conviction for other immigration purposes).

144. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006).

145. 18 U.S.C. § 16 (2006).

> The term "crime of violence" means— (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. This definition does not limit crimes of violence to merely felony-level offenses.

146. The BIA initially held DWI offenses to be crimes of violence, making them aggravated felonies and causing lawful permanent residents convicted of such crimes to be subject to mandatory deportation, regardless of when their DWI offenses had occurred. *See In re* Puente-Salazar, 22 I&N Dec. 1006 (B.I.A. 1999) (holding that a DWI conviction in Texas also constituted a crime of violence and "aggravated felony"); *In re* Magallanes-Garcia, 22 I&N Dec. 1 (B.I.A. 1998) (holding that DUI conviction in Arizona was a "crime of violence" and thus an "aggravated felony"). Circuits were deeply divided on the issue. Circuits holding that a DWI offense did not constitute a crime of violence include the Second, Fifth, Seventh, and Ninth Circuits. Dalton v. Ashcroft, 257 F.3d 200, 202 (2d Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921, 928 (5th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600, 609 (7th Cir. 2001) United States v. Trinidad-Aquino, 259 F.3d 1140, 1146 (9th Cir. 2001). The Tenth and Eleventh Circuits have held that a DWI offense does constitute a crime of violence. Tapia Garcia v. INS, 237 F.3d 1216, 1223 (10th Cir. 2001); Le v. U.S. Att'y Gen., 196 F.3d 1352, 1354 (11th Cir. 1999).

147. Leocal v. Ashcroft, 543 U.S. 1 (2004). The Court held that a DWI offense either lacking or possessing a *mens rea* component of mere negligence did not constitute a crime of violence, but limited this finding to DWI or DUI offenses. *Id.* at 11–12. "This case does not present the question whether an offense requiring proof of the *reckless* use of force against another's person or property qualifies as a crime of violence." *Id.* at 13. This

ground.[148] Crimes that have been found to be "aggravated felonies" range from misdemeanor shoplifting[149] to murder.[150]

Although conviction of an "aggravated felony" is a ground of deportability, it does not appear as a ground of inadmissibility[151] nor does it trigger the ground of inadmissibility for permanent ineligibility for U.S. citizenship.[152] Thus, a conviction of the same conduct essentially "punishes" lawful permanent residents in a harsher manner than aliens not lawfully admitted. In an effort to extend this "benefit" more fairly, the Fifth Circuit has recently held that in the case of certain lawful permanent residents who adjusted status within the United States as opposed to receiving their residency at U.S. consulates abroad, a discretionary waiver of this ground of inadmissibility is available.[153]

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leaves open the issue of whether crimes such as reckless driving constitute crimes of violence.

148. *See INS Set to Deport 500 for Drunken Driving*, L.A. TIMES, Sept. 4, 1998, http://articles.latimes.com/print/1998/sep/04/news/mn-19458 (reporting that lawful permanent residents, comprised mostly of the 500 non-citizen aliens, were arrested and placed in removal proceeding as "aggravated felons" following an infamous INS sweep called "Operation Last Call"). Among those lawful permanent resident erroneously deported as an "aggravated felon" was Mateo Salgado, who promised his family he would return to their home in Houston. Hon. Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 253 (2004). Attempting to re-enter illegally, Salgado was one of eighteen immigrants abandoned, locked inside a refrigerator-truck trailer and ultimately died of suffocation and heat. *Id.*

149. United States v. Christopher, 239 F.3d 1191 (11th Cir. 2001).

150. INA § 101(a)(43(A), 8 U.S.C. § 1101(a)(43)(A) (2006).

151. INA §212(a)(8), 8 U.S.C. § 1182(a)(8).

152. *In re* Kanga, 22 I&N Dec. 1206, 1206 (B.I.A. 2000).

153. *See* Martinez v. Mukasey, 519 F.3d 532, 546 (5th Cir. 2008) (holding that lawful permanent residents who obtained that status by adjusting *inside* the United States, as opposed to the more common route of obtaining an immigrant visa at a U.S. consulate abroad, are eligible to apply for a discretionary waiver under INA § 212(h), 8 U.S.C. § 1182(h), which effectively allows them to "readjust" their status and become lawful permanent residents again). Closely examining the language of the § 212(h) statute, it restricts application of the waiver "in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence." INA § 212(h), 8 U.S.C. § 1182(h) (2006). The Fifth Circuit found that this restriction did not include aliens who entered the United States in a status other than that of a lawful permanent resident, and adjusted within the country. *Martinez*, 519 F.3d at 546. A surprising decision for the normally conservative Fifth Circuit, some scholars have expressed concern that the finding, which hinge on the definition of "admitted," could be abrogated by the Supreme Court's decision in *Vartelas v. Holder*. Gary Endelman, *Can Martinez v. Mukasey Survive a Supreme Court Decision in* Vartelas v Holder*?,* GARY ENDELMAN ON IMMIGR. POL'Y L. (Oct. 27, 2011, 2:18 PM), http://blogs.ilw.com/garyendelman/2011/10/can-martinez-v-mukasey-survive-a-supreme-court-decision-in-vartelas-v-holder.html. In a somewhat unexpected move, however, the Court refused to apply the IIRIRA definition of "admitted" retroactively to cases involving pre-IIRIRA crimes, possibly bolstering the

2. Crimes Involving Moral Turpitude (CIMTs)

> "[M]oral turpitude" is perhaps the quintessential example of an ambiguous phrase.
>
> Judge O'Scannlain, *Marmolejo-Campos v. Holder* (2009)[154]

A crime involving moral turpitude (CIMT) will constitute a ground for deportability of a lawful permanent resident convicted of a single CIMT for which the potential sentence *can be* a year or more, if the crime was committed within five years of his admission to the United States. A conviction following an admission of two CIMTs not arising from the same scheme constitutes a ground of deportability regardless of how long after the individual's admission to the United States the crimes occurred.[155] An alien is inadmissible if he is convicted *or merely admits* to having committed the essential elements of a CIMT at any time in his adult life.[156] In addition, CIMTs can result in other consequences including ineligibility for various forms of immigration relief and bars to naturalization.

Despite the potentially serious impact of a CIMT, Congress has neglected to define "moral turpitude." Courts have struggled with creating a definition of their own, although a commonly used definition includes "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[157] In 2008, the Attorney General attempted to clarify the issue by creating his own definition of moral turpitude; a "reprehensible act with some form of scienter."[158] Needless to say, confusion has continued on this issue, especially in light of the strict categorical, modified categorical, and "non-elemental facts" analyses.

> Once again we face the question of what is moral turpitude: a nebulous question that we are required to answer on the basis of judicially established categories of criminal conduct. Although that may not be a satisfactory basis for answering such a question, it is the role to

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Martinez reasoning. Vartelas v. Holder, No. 10-1211, 565 U.S. __, 2012 WL 1019971 (Mar. 28, 2012).

154. Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (Circuit Judge O'Scannlain, writing for the majority).

155. INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2006); s*ee In re* Adetiba, 20 I&N Dec. 506 (B.I.A. 1992) (interpreting the "single scheme of criminal misconduct" very narrowly).

156. INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A). A "petty offense" exception exists for a single CIMT for which the maximum possible sentence could not have exceeded year and the actual sentence did not exceed six months. INA § 212(a)(2)(A)(ii)(ll), 8 U.S.C § 1182(a)(2)(A)(ii)(II).

157. *In re* Franklin, 20 I&N Dec. 867 (B.I.A. 1994).

158. *In re* Silva-Trevino, 24 I&N Dec. 687, 688, 706 (B.I.A. 2008).

> which we are limited by precedent as a court of law . . . . While under our law numerous felonies are deemed not to be morally turpitudinous, all acts of petty theft automatically qualify for that label and the drastic legal consequences that may follow. As some in today's society might say, and with good reason, "Go figure."
>
> Judge Reinhardt, *Nunez v. Holder* (2010)[159]

Certain crimes are consistently considered CIMTs, but there is ambiguity with others. Some crimes held to be CIMTs seem somewhat obvious, such as crimes involving dishonesty, fraud,[160] theft,[161] robbery,[162] burglary,[163] extortion,[164] violence, kidnapping,[165] aggravated assault,[166] firearm violations,[167] murder;[168] sexual crimes, sexual assault of a child,[169] rape,[170] prostitution,[171] and gross indecency.[172] These crimes have all been held to be CIMTs. However, other less serious crimes have also been categorized as CIMTs, including knowingly issuing a check without funds,[173] petty larceny,[174] lewdness,[175] contributing to the delinquency of a minor,[176] mayhem,[177] and consensual statutory rape.[178] Carrying a concealed weapon has also been held to be a CIMT when there is intent to use the weapon against another person;[179] however, without intent, the crime has been held not to constitute a CIMT.[180]

It should be noted that many CIMTs would qualify as "aggravated felonies" under the expanded definition or constitute as other grounds of inadmissibility or deportability in addition to those stemming from a CIMT

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159. Nunez v. Holder, 594 F.3d 1124, 1127 (9th Cir. 2010).
160. *In re Adetiba*, 20 I& N Dec. at 506.
161. *In re* Alarcon, 20 I&N Dec. 557, 557–58 (B.I.A. 1992).
162. United States *ex rel.* Dentico v. Esperdy, 280 F.2d 71, 72 (2d Cir. 1960).
163. *In re* Frentescu, 18 I&N Dec. 244, 244–45 (B.I.A. 1982).
164. *In re* F., 3 I&N Dec. 361, 361 (B.I.A. 1948).
165. *In re* Nakoi, 14 I&N Dec. 208, 208 (B.I.A. 1972).
166. *In re* Perez-Contreras, 20 I&N Dec. 615, 615 (B.I.A. 1992).
167. De Lucia v. Flagg, 297 F.2d 58, 59 (7th Cir. 1961).
168. Rodriguez-Padron v. INS, 13 F.3d 1455, 1458 (11th Cir. 1994).
169. Gouveia v. INS, 980 F.2d 814, 815 (1st Cir. 1992).
170. Castle v. INS, 541 F.2d 1064, 1065–66 (4th Cir. 1976).
171. *In re* Lambert, 11 I&N Dec. 340, 340 (B.I.A. 1965).
172. Marinelli v. Ryan, 285 F.2d 474, 475–76 (2d Cir. 1961).
173. *In re* Khalik, 17 I&N Dec. 518, 518 (B.I.A. 1980).
174. Price v. Keisler, 251 Fed. App'x 703, 705 (2d Cir. 2007).
175. Wyngaard v. Kennedy, 295 F.2d 184, 184 & n.1 (D.C. Cir. 1961).
176. 9 FAM 40.21(a) N2.3-3.
177. *In re* Santoro, 11 I&N Dec. 607, 608 (B.I.A. 1966).
178. 9 FAM 40.21(a) N2.3-3.
179. *In re* S., 8 I&N Dec. 344, 344 (B.I.A. 1959).
180. United States *ex rel.* Andreacchi v. Curran, 38 F.2d 498, 498 (S.D.N.Y. 1926).

finding. Justice Jackson, dissenting, in *Jordan v. De George*[181] summed up the confusions of CIMT by stating "[T]here appears to be universal recognition that we have here an undefined and undefinable standard."[182]

3. Narcotics Offenses

In 2010, 25.3% of non-citizen aliens deported as convicted criminals were removed for narcotics offenses.[183] An alien who abuses drugs, or becomes addicted to drugs, after being admitted to the United States is subject to deportation.[184] Although a conviction is not necessary to support this ground, a conviction for "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance" is itself an additional ground of deportability, except in cases of a single offense involving less than thirty grams of marijuana for personal use.[185] This also includes related inchoate offenses. Crimes involving drug paraphernalia are also considered "relating to a controlled substance," and thus give rise to deportation.[186]

Conviction under any law relating to a controlled substance or even mere admission to the use of any controlled substance renders an alien inadmissible.[187] As previously discussed in this Comment, any alien for whom a consular officer finds a "reason to believe" is a narcotics trafficker is also inadmissible, even without a conviction.[188]

4. Firearms Offenses

Conviction of any crime involving a firearm or "destructive device,"[189] following lawful admission to the United States, constitutes grounds for deportability;[190] as with narcotics offenses, it is irrelevant whether the crime was a misdemeanor or a felony. Ironically, there is no similar ground of inadmissibility for a weapons offense. Again, this essentially punishes lawful permanent residents more harshly than aliens present in

181. 341 U.S. 223, 235 (1951).

182. *Id.*

183. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 23.

184. INA § 237(a)(2)(5)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (2006) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

185. INA §237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

186. Luu-Le v. INS, 224 F.3d 911, 913 (9th Cir. 2000).

187. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

188. INA § 212(a)(2)(C)(i), 8 U.S.C. §1182(a)(2)(C)(i).

189. 18 U.S.C. § 921(a)(4) (2006) (defining destructive device to include bombs, grenades and missiles).

190. INA § 237(a)(2)(c), U.S.C. § 1227(a)(2)(C).

a temporary status or an unlawful status.[191] Even where the offense does not support a finding of deportability under this ground, weapon offenses may constitute grounds of deportability as aggravated felonies[192] or as CIMTs.[193]

5. Family Violence Crimes

Grounds of deportability, though not inadmissibility, exist for violating a protective order[194] as well as "a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment" if the crime is also a "crime of violence."[195] In Texas, a conviction under Texas Penal Code Section 22.01 for assault of a family member has been held by the Fifth Circuit not to be a crime of violence, and thus a violation does not trigger deportability.[196] As discussed previously, a "crime of violence" for which a sentence of a year or more is given constitutes as an "aggravated felony."[197]

6. Miscellaneous Crimes

The criminal grounds discussed above are not intended as an exhaustive list. Additional grounds of deportability exist for aliens convicted of high-speed flight from immigration checkpoints,[198] failure to register as a sex-offender,[199] alien smuggling,[200] and other crimes.[201] Additional grounds of inadmissibility exist as well, notably for aliens who have been convicted of two or more offenses for which the aggregate sentences imposed were five years or more, regardless of whether these crimes constitute CIMTs or "aggravated felonies."[202]

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191. In some states, the statute for unlawfully carrying a weapon includes items not included in the federal definition of firearms and destructive devices. *See* TEXAS PENAL CODE § 46.02 (2011) (defining "a handgun, illegal knife, or club" as a weapon). Where the statute is divisible in this way, the court may look beyond the statute to determine if the weapon involved was a firearm or destructive device; however, the court is limited in its investigation to the record of conviction. *In re* Short, 20 I&N Dec. 136, 137–38 (B.I.A. 1989).

192. INA §§ 101(a)(43)(B)–(C), 8 U.S.C. §§ 1101(a)(43)(B)–(C) ("Aggravated felony" includes "illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c)) of that title.").

193. *In re* S., 8 I&N Dec. 344 (B.I.A. 1959)

194. INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii).

195. INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

196. United States v. Villegas-Hernandez, 468 F.3d 874, 885 (5th Cir. 2006).

197. INS § 101(a)(43(F), 8 U.S.C. § 1101(a)(43)(F).

198. INS § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv).

199. INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v).

200. INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1227(a)(2)(D)(iv).

201. INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D).

202. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).

E. *Crimes Committed By Juvenile: CIMTs and Juveniles*

Criminal conduct gives rise to consequences for juvenile aliens beyond what juvenile citizens may face, regardless of their infancy. For federal purposes, a juvenile is defined as someone who has not yet reached his eighteenth birthday[203] and a disposition of juvenile delinquency is not a conviction for immigration purposes.[204] As discussed previously in this Comment, grounds of deportability and inadmissibility can be both conviction-based and conduct-based. Where a conviction is not required, infancy of the alien is no defense to the ground of deportability or inadmissibility.

Conduct-based offenses, which can render a juvenile alien inadmissible, include conduct giving rise to a reasonable belief that the alien has membership in a criminal gang, is an active drug user,[205] or engages in prostitution.[206] Similar grounds of deportability exist for conduct committed by juvenile aliens admitted to the United States as lawful permanent residents.[207] These grounds reach conduct by juveniles, regardless of their ages at the time the conduct occurred or whether the conduct resulted in juvenile delinquency dispositions. Additionally, a non-citizen alien convicted of a crime committed before his eighteenth birthday may still be subject to conviction-based grounds of inadmissibility and deportability if he is tried as an adult;[208] such a conviction can give rise to the same consequences as would a conviction for a crime committed by an adult alien.[209]

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203. 18 U.S.C. § 5031 (2006).

> For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x).

Id.

204. *In re* Devison, 22 I&N Dec. 1362, 1362 (B.I.A. 2000).

205. Because INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv) does not require a conviction, an admission of narcotics use or charges for narcotics use later dismissed can for the basis of applying this ground of inadmissibility. INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(1)(A)(iv).

206. INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D).

207. *See* INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable."). As discussed in Part III, conduct-based grounds of deportability, which do not require convictions, may be applied to juveniles.

208. *In re* Devison, 22 I&N Dec. at 1362.

209. Some states have youthful offender programs for persons who commit crimes between the ages of sixteen and twenty-one. For a juvenile convicted as part of a youthful

Adult aliens are inadmissible for having been convicted of, or having admitted to committing the elements of, a CIMT. In the case of juveniles, a single CIMT committed before the juvenile turned eighteen is excused when at least five years have passed between commission of the crime or the juvenile's release from confinement, and the juvenile's application for admission to the United States.[210] A juvenile convicted of two CIMTs before the age of eighteen, however, remains inadmissible.[211] Where a

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offender program, further analysis is required to determine whether a finding of guilt will be a considered a conviction for immigration purposes. Under *Devison,* the BIA found the appropriate test was to "apply a federal standard, analyzing state juvenile or youthful offender proceedings against" the Federal Juvenile Delinquency Act (FJDA). *Id.* at 1371; *see* Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–42 (2006) (permitting and providing guidelines for federal delinquency proceedings in cases in which state courts are not able to or will not accept jurisdiction). Applying this test from *Devison*, guilty dispositions under youthful offender programs in the District of Columbia and Michigan were found to be convictions for immigrations purposes; whereas dispositions in New York found the opposite thus not triggering convictions based on grounds of inadmissibility and deportability for the juvenile alien. *See* Badewa v. Att'y Gen., 252 Fed. App'x 473, 474 (3d Cir. 2007) (finding an adjudication of guilt under the District of Columbia Code's Youth Rehabilitation Act of 1985 to constitute a conviction for immigration purposes), *and* Uritsky v. Gonzales, 399 F.3d 728, 729 (6th Cir. 2005) (finding that a plea of guilty under the Michigan's Youthful Trainee Act constitutes a conviction for immigration purposes); *but see In re Devison*, 22 I&N. Dec. at 1362 (finding that a conviction as a "Youthful Offender" under New York law did not constitute a conviction for immigration purposes). Because the *Devison* test analyzes the structure of the state youthful offender program and does not look to the underlying criminal conduct, the door remains open for treating similar criminal conduct by juvenile aliens in different states differently, thereby triggering grounds of inadmissibility and deportability based, in part, on the state in which the offense was committed. The BIA also controls whether a juvenile's conviction *outside* the United States will constitute a "conviction" for United States immigration purposes. *See In re* Ramirez-Rivero, 18 I&N Dec. 135, 135 (B.I.A. 1981) (holding that where a juvenile's foreign crime could not have been transferred to adult court in the United States under the FJDA, it should not be considered a conviction for immigration purposes, regardless of how it was considered in the foreign country). Where a juvenile alien has benefitted from a foreign youthful offender scheme, the burden appears to be on the alien to show that he was treated as a juvenile, rather than an as adult. *See In re* De La Nues, 18 I &N Dec. 140, 144 (B.I.A. 1981) (holding that a foreign crime which could, but did not have to, be transferred to adult court under FJDA had it been committed in the United States, must have been treated as an adult conviction by the foreign jurisdiction to be considered a conviction for immigration purposes in the United States).

210. INA § 212(a)(2)(A)(ii)(l), 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (2006).

211. 22 C.F.R. § 40.21(a)(3) (2011).

> Two or more crimes committed under age 18. An alien convicted of a crime involving moral turpitude or admitting the commission of acts which constitute the essential elements of such a crime and who has committed an additional crime involving moral turpitude shall be ineligible under INA § 212(a)(2)(A)(i)(I), [8 U.S.C. § 1182(a)(2)(A)(i)(I)] *even though the crimes were committed while the alien was under the age of 18 years.*

Id. (emphasis added).

juvenile has committed a single CIMT offense, he remains inadmissible if he was convicted of a "felony involving violence" between his fifteenth and eighteenth birthdays and was tried as an adult, "regardless of whether at the time of conviction juvenile courts existed within the convicting jurisdiction."[212]

IV. Problems Caused by the Crime-Based Grounds of Inadmissibility and Deportability, and the Need for Discretionary Relief from Deportation in Current and Future Removal Cases

As discussed in the previous three parts, there are many ways a lawful permanent resident alien can become deportable or inadmissible for criminal conduct. Most notably, immigration reforms passed in the 1990s dramatically increased the conduct for which any non-citizen alien could be removed, and have restricted and eliminated judicial discretion to avoid removal. By retroactively applying new definitions, these reforms caused thousands of lawful permanent residents to become deportable as criminal aliens when previously they had not been.

The result of these complex changes to an already complicated body of law has been dramatic. Executive Office for Immigration Review (EOIR) figures released in January of 2011 revealed that in 2010, the immigration courts in the United States were presented with an unprecedented 392,888 matters.[213] By June of that year, ICE memoranda admitted that "the agency is confronted with more administrative violations than its resources can address."[214] In August of 2011, President Barack Obama announced that, unable to process the current backlog, DHS would be conducting a case-by-case review of more than 300,000 pending removal cases,[215] but failed to address the underlying problems responsible for this enormous backlog. Although the removal cases pending before our nation's immigration courts include more than those triggered by crime, in 2010 ICE issued 223,217 charging documents through their Criminal Alien Program (CAP), which initiated removal on criminal grounds.[216] The following part of this Comment details some of the cases of aliens pending removal for criminal conduct and address how restoring

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212. *Id.* § 40.21(a).

213. Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2010 Statistical Year Book A1 (2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf.

214. Memorandum from John Morton, *supra* note 27.

215. Jim Barnett, *Administration Says it Will Conduct Case-by-Case Review on Deportation,* CNN (Aug. 18, 2011), http://articles.cnn.com/2011-08-18/politics/deportation.reviews_1_immigrant-students-illegal-immigrants-immigration-judges/2?_s=PM:POLITICS.

216. Immigration Enforcement Actions, *supra* note 23.

judicial discretion—to both trial judges and immigration judges—could help address this problem for cases arising from contemporary and future crimes.

A. *The Hunt for "Criminal Aliens"*

ICE defines any alien who has had a criminal conviction as a "criminal alien," regardless of whether that conviction formed the basis of the alien's removal from the United States or what crime that conviction resulted from.[217] From 2005 to 2009, Congress more than doubled the budget of ICE, spending over $24 billion on the agency in five years.[218] The largest allocation of ICE funds went to Enforcement and Removal Operations (ERO),[219] an office tasked with locating, detaining, and removing aliens as well as "prioritiz[ing] the apprehension, arrest and removal of convicted criminals."[220] Various other programs within ICE that targeted criminal aliens also received large allocations of funds; including the Secure Communities Program which received $150 million in 2009.[221] In October of 2009, Customs and Border Protection (CBP), another agency within DHS, quietly announced a new initiative to specifically identify lawful permanent residents with prior criminal convictions as they returned home from trips abroad with the intention of initiating removal proceedings against them.[222] This was a big step away from previous enforcement initiatives, which had focused primarily on removal of aliens with contemporary interactions with law enforcement; furthermore, this effort presented a new source of easily apprehended "criminal aliens."[223] A possible reason for the new program surfaced a few months

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217. *Detention of Criminal Aliens: What Has Congress Bought?*, TRAC IMMIGRATION (Feb. 11, 2010), http://trac.syr.edu/immigration/reports/224/ [hereinafter TRAC IMMIGRATION](reporting that "the term also includes those found guilty of minor violations of the law such as traffic offenses and disorderly conduct. Immigration violations such as illegal entry into the United States, which the law defines as a petty offense, are included as well").

218. *Id.*

219. The office of Enforcement and Removal Operations (ERO) within ICE was previously known as the office of Detention and Removal Operations (DRO).

220. *ICE Enforcement and Removal Operations*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/offices/enforcement-removal-operations/ (last visited Nov. 8, 2011).

221. TRAC IMMIGRATION, *supra* note 217.

222. AM. IMMIGRATION LAWYERS ASS'N, CHANGE IN CBP POLICY ON DEFERRED INSPECTION OF LEGAL PERMANENT RESIDENTS WITH CRIMINAL CONVICTIONS – OCTOBER 1, 2009 (2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

223. Left unaddressed was why, with a stated enforcement policy of targeting the "worst of the worst" criminal aliens in an effort to protect public safety, these returning lawful permanent residents with prior convictions hadn't been identified for removal sooner. If these persons, having convictions recorded in the United States, were as poten-

later when, in January of 2010, ICE released a memorandum "clarifying" for agents the number of "criminal aliens" each agent was expected to apprehend per month in order to meet performance review goals.[224] A short time later an inter-office e-mail sent by ERO Director James M. Chaparro to lower-level ICE directors thanked them for their efforts, and encouraged them to "keep up the good work on criminal alien removals" to reach the agency's goal of 150,000 removals in fiscal year 2010.[225] Just fifteen months before the memo in which he announced that ICE had identified more immigration violators than it could handle, ICE Director John Morton told the National Law Journal: "This isn't a question of whether or not we will detain people. We will detain people, and we will detain them on a grand scale."[226]

Morton was right. Shortly before President Obama's August 2011 announcement that an overloaded DHS would review pending removal cases, ICE released figures showing that in fiscal years 2009, 2010, and data through July 31, 2011, a total of 1,107,415 aliens had been removed from the United States; of those removed, 496,460 were removed as "convicted criminal aliens."[227]

Studies show that an increase in immigrant population coincides with a decrease in both violent and property crimes. Men between the ages of eighteen and forty born outside the United States are ten times less likely

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tially dangerous as was claimed, it seems a failing on the part of ICE to not have made an effort to locate them sooner, if their removal was truly a priority to protect public safety. The fact that these individuals were not identified or targeted until they travelled abroad at which time they voluntarily disclosed prior convictions to CBP inspectors suggests that the primary motivation was in fact fulfillment of quotas of "criminal aliens." *See* E-mail from James M. Chaparro, Dir., Detention and Removal Operations (DRO), Immigration and Customs Enforcement (ICE), to Field Office Directors and Deputy Field Office Directors (Feb. 22, 2010, 8:05 a.m.), *available at* http://media.washingtonpost.com/wpsrv/politics/documents/ICEdocument032710.pdf?sid=ST2010032700037 (discussing ICE quotas for removal of criminal aliens); Memorandum from Clinton A. Felsom, Supervisory Detention and Deportation Officer, to Immigration Enforcement Agent (Jan. 4, 2010), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf?sid=ST2010032700037 (discussing quotas for the removal of "criminal aliens" imposed upon individual ICE agents in order to meet performance goals).

224. Memorandum from Clinton A. Felsom, *supra* note 223.

225. E-mail from James M. Chaparro, *supra* note 223.

226. Jenna Greene, *ICE Warms up to Detainees; Immigration Chief Promises Overhaul of 'Haphazard' System,* NAT'L L. J., Feb. 8, 2010.

227. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ICE TOTAL REMOVALS THROUGH JULY 31, 2011 (2011), *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf.

than those born in the United States to be incarcerated.[228] So where are all these criminal aliens coming from?

As discussed previously, growing lists of minor acts forming the bases for inadmissibility and removability, application of grounds of inadmissibility to long-term permanent residents, and infinite retroactivity of new grounds to crimes prosecuted decades ago have rendered an increasing percentage of the country's thirty-one million non-citizen aliens deportable as "criminal aliens," often without their knowledge. This combined with an increased focus on the removal of criminal aliens, new database systems, and newly computerized records have suddenly exposed hundreds of thousands of lawful permanent residents to removal, often times for minor or very old convictions or conduct.

Additionally, eliminating the ability of trial judges to recommend against deportation means that neither the court nor the alien can prevent a conviction from resulting in a removal case. Dramatic limits on the ability of immigration judges to exercise discretion mean that, when these cases come before their courts, few options exist to avoid removal.

The statistics surrounding these removals are alarming. Even before the birth of Secure Communities, statistics from 1997 to 2007 show that seventy-two percent of illegally present aliens were deported for non-violent crimes, and seventy-seven percent of legally present aliens were deported for non-violent crimes.[229] The average alien had been living in the United States for 3.3 years before facing removal in 2006; three years later the average alien had been in the United States for more than 7.2 years before facing removal, reflecting the increased focus by DHS on removing aliens for old crimes.[230] In 2010, 62.3% of aliens removed from

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228. Kathleen Kingsbury, *Immigration: No Correlation with Crime,* TIME, Feb. 29, 2008, http://www.time.com/time/nation/article/0,8599,1717575,00.html.

> Since the early 1990s, over the same time period as legal and especially illegal immigration was reaching and surpassing historic highs, crime rates have *declined*, both nationally and most notably in cities and regions of high immigrant concentration (including cities with large numbers of undocumented immigrants such as Los Angeles and border cities like San Diego and El Paso, as well as New York, Chicago, and Miami).

ANITA KHASHU, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 11 (2009), *available at* http://www.policefoundation.org/pdf/strikingabalance/Narrative.pdf (reporting that the rate of foreign-born men incarcerated in the United States during the study period "was less than half the incarceration rate for non-Hispanic Whites (1.71 percent)").

229. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS), *supra* note 54, at 2.

230. *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, TRAC IMMIGRATION (June 18, 2009), http://trac.syr.edu/immigration/reports/208/.

the United States as "criminal aliens" were removed based on convictions relating to narcotics, vehicular-traffic, or immigration violations.[231]

B. *Discretion and Relief*

When the concept of judicial discretion was first debated by Congress in 1916, the reasons given for its creation suggested a recognition that for aliens, deportation from the United States was indeed part of the total punishment for serious crimes; however the inclusion of the provision authorizing relief from removal at the recommendation of the trial judge also recognized that removal should be avoided in cases where such a stiff penalty was unwarranted under the circumstances.[232] Interestingly, this need for discretion was acknowledged when crime-based grounds of deportability were only themselves being debated and in a year when only 2,783 total aliens were deported from the United States.[233] In 1990 when JRAD was repealed by IMMACT 90, 26,310 aliens were deported from the United States, of which 8,623 were removed on crime-based grounds;[234] in 2010, 387,242 aliens were deported from the United States, of which 168,532 were removed as "criminal aliens."[235] Of these, the majority of aliens are believed to have been lawful permanent residents.[236]

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231. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 23. Narcotics convictions include the manufacture, possession, sale, and distribution of illegal drugs. *Id.* Immigration crimes include unauthorized entry or reentry, alien smuggling, and false claims to citizenship. *Id.*

232. *See* Janvier v. United States, 793 F.2d 449, 453 (2d. Cir. 1986) (mentioning Congress's debates surrounding the issue of deportation as a harsh punishment for certain crimes).

233. Immigration and Passenger Movement Total Number of Immigrants in Specified Years, 1896 to 1992; by Sex and Age; Also Immigrants Debarred and Deported, and Illiterates Over 14 and 16 Years of Age 89, tbl. no. 63 (1922), *available at* http://www2.census.gov/prod2/statcomp/documents/1922-03.pdf. In 1917, one alien was deported within one year of arrival to the United States, and 1,852 aliens were deported within three years of arrival to the United States. *Id.* at 89 tbl. no. 63.

234. U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 227, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf.

235. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 23, at 94, 102.

236. Danny Hakim & Nina Bernstein, *New Paterson Policy May Reduce Deportations*, N.Y. TIMES, May 3, 2010, http://www.nytimes.com/2010/05/04/nyregion/04deport.html.

1. Systematic Elimination of Discretion by Trial Court Judges: The End of Judicial Recommendation Against Deportation (JRAD)

> No one can object to [JRAD], because no judge would deliberately order that deportation be not made unless there was good reason for it.
>
> Rep. Adolph Sabath (D-Ill.) (1916)[237]

Although earlier laws existed to render aliens outside the United States inadmissible, legislation passed by the 64th Congress in 1917 created the first crime-based grounds of deportability, allowing the removal of aliens from the United States after their lawful admission. Significantly, this legislation not only established a ground of deportability for CIMTs committed within the United States,[238] but also established a basis for the application of discretion.[239] The concurrent creation of grounds of removability and discretionary relief to suspend that removal seems an implicit recognition of the importance of discretion in this area.

JRAD was modified significantly in 1952 when legislation re-codified crime-based grounds of deportability. JRAD remained available as a dis-

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237. 53 CONG. REC. 5165, 5169. Rep. Adolph Joachim Sabath, D-Illinois, was born in Zabori, Bohemia, but immigrated to the United States in 1881, at the age of fifteen. He became a U.S. Congressman in 1907, and served twenty-three consecutive terms until his death in 1952. *See* AM. JEWISH ARCHIVES, http://americanjewisharchives.org/aja/FindingAids/Sabath.htm (last visited Oct. 17, 2011) (detailing the biographical history of Rep. Adolph Joachim Sabath).

238. Immigration and Nationality Act of 1917, Pub. L. No., ch. 28, § 19, 39 Stat. 874, 889.

> [E]xcept as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

Id.

239. *Id.* at 39 Stat. 889–90.

> [T]he provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act[.]

Id.

cretionary relief[240] to crime-based grounds of deportability found in Section 241(a)(4) of the legislation,[241] however, grounds of deportability for narcotics offenses were not codified as CIMTs in sub-section(a)(4), but instead now appeared in Section 241(a)(11).[242] Thus, aliens deportable under Section 241(a)(11) ground relating to narcotics were no longer eligible to receive a JRAD recommendation against their removal. Narcotics offenses continue to constitute the single largest basis of removal of aliens from the United States; in 2010, 42,692 aliens were deported for

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240. Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 477, § 241(b), 66 Stat. 163, 208.

> The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney Generalthat such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Id.

241. *Id.* at 66 Stat. 204.

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .
>
> . . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial[.]

Id.

242. *Id.* at 66 Stat. 206–07.

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .
>
> . . . .
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate[.]

Id. at 66 Stat. 204, 206–07.

criminal activity relating to illegal narcotics, representing 25.3% of the total removals on crime-based grounds.[243]

In 1988, Congress, through the Anti–Drug Abuse Act (ADAA), first created the expanded definition of "aggravated felony" and established conviction of an "aggravated felony" as a separate ground of deportability.[244] Even as this new ground was created, however, ADAA also notably added "aggravated felony" to those criminal convictions for which JRAD discretion remained available,[245] clearly suggesting the intent that while certain serious criminal convictions should generally result in deportation, some discretion by trial judges was still necessary to ensure fair application of this new provision. This view, however, did not last long. Two years later, the Immigration Act of 1990 (IMMACT 90) repealed JRAD discretion completely.[246]

2. Limitations to Authority and Discretionary Relief Available to Immigration Judges

> [I]n many cases I have had to deal with the frustration of not being able to grant relief to someone because of the precise requirements

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243. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 23.

244. INA § 238(c), 8 U.S.C. § 1228(c) (2006). "An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States." *Id.* at § 228(b).

245. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344, 102 Stat. 4181, 4470–71.

> GROUNDS OF DEPORTATION. (a) IN GENERAL.—Section 241(a)(4) (8 U.S.C. 1251(a)(4)) is amended—
>
> . . . .
>
> 2) by inserting after the semicolon the following: " or (B) is convicted of an aggravated felony at any time after entry;" (b) APPLICABILITY.—The amendments made by subsection (a) shall apply to any alien who has been convicted, on or after the date of the enactment of this Act, of an aggravated felony.

Id.

246. Immigration Act of 1990 (IMMACT 90), Pub. L. 101-649, § 505(a), 104 Stat. 4978, 5050.

> ELIMINATION OF JUDICIAL RECOMMENDATIONS AGAINST DEPORTATION.
>
> (a) IN GENERAL.—Section 241(b) (8 U.S.C. 1251(b)) is amended—
>
> (1) in the first sentence—
>
> (A) by striking "(1)", and
>
> (B) by striking ", or (2)" and all that follows up to the period at the end; and
>
> (2) in the second sentence, by inserting "or who has been convicted of an aggravated felony" after "subsection (a)(11) of this section."

Id. IMMACT 90 also restricted or eliminated other forms of discretionary relief for aliens convicted of "aggravated felonies" under the expanded definition, including waivers under Section 212(c), grants of asylum, suspension of deportation, withholding of deportation, and voluntary departure. *Id.*

> of the statute, even though on a personal level he appears to be worthy of some immigration benefit.
>
> Immigration Judge James P. Vandello (2003)[247]

Shortly after IMMACT 90 eliminated the ability of trial judges to recommend against deportation, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) severely curtailed the ability of lawful permanent residents to apply for "212(c) relief" from deportation on several crime-based grounds, even as IIRIRA vastly expanded the list of crimes giving rise to deportation.[248] Waiver of certain grounds of deportability

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247. Hon. James P. Vandello, *Perspective of an Immigration Judge,* 80 DENV. U. L. REV. 770, 775 (2003).

248. The creation of mandatory deportation for lawful permanent residents came in the form of gradual elimination of relief under INA Section 212(c), 8 U.S.C. Section 1182(c), generally referred to as "212(c)." Repealed by 1996's IIRIRA (Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546), the now-repealed 212(c) allowed "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad . . . may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section[ ]" creating discretionary relief from removal. INA § 212(c), 8 U.S.C. § 1182(c) (1994). Found in INA § 212, which lists grounds of inadmissibility, 212(c) relief was initially found applicable only to *inadmissible* lawful permanent residents returning to the United States after a trip abroad, and inapplicable to *deportable* lawful permanent residents charged with the same conduct, but who did not travel; courts eventually found that that distinction violated the Equal Protection Clause and held that 212(c) relief should be applied to lawful permanent residents charged with removal under both INA § 212's grounds of inadmissibility and INA § 237's grounds of deportability. *See* Francis v. INS, 532 F.2d 268, 272–73 (2d Cir. 1976) (holding that "individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest"); *In re* Silva, 16 I&N Dec. 26, 30 (B.I.A. 1976) (holding that constitutional due process and the Equal Protection Clause does not allow for making distinctions "between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens."). Broad applicability of 212(c)'s relief to grounds of deportability was somewhat short-lived—the BIA later decided that 212(c) relief would only apply to grounds of *deportability* where the ground was "analogous" to a ground of *inadmissibility* for which 212(c) relief would be available. *In re* Wadud, 19 I.&N. Dec. 182, 184 (B.I.A. 1984). In 1990, IMMACT 90 precluded 212(c) relief when the respondent had been convicted of an "aggravated felony" and had served more than five years in prison. *See* IMMACT 90, § 511, 104 Stat. at 4978, 5052 (amending INA § 212(c), 8 U.S.C. § 1182(c)). 1996's AEDPA further eliminated 212(c) relief in all cases triggered by an "aggravated felony", narcotics offense, more than one CIMT conviction and certain firearms offenses. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, § 440(d), 110 Stat. 1214, 1277 (further amending INA § 212(c), 8 U.S.C. § 1182(c)). A few months later, IIRIRA repealed 212(c) relief (in the context of both inadmissibility and deportability) entirely. *See* Illegal Immigrant Reform and Immigrant Responsibility Act of Sep. 30, 1996 (IIRIRA), Pub. L. No. 104-208, § 240B(c), 110 Stat. 3009-546, 3009-597 (repealing all forms of 212(c) relief). The issue again became relevant in 2002 when the landmark decision, *INS v. St. Cyr*, held that although 212(c) relief had been repealed and the ever-broadening definition of an "aggravated felony" was allowed to apply retroactively, 212(c) relief must

be allowed to apply to cases in which lawful permanent residents pleaded guilty to offenses for which they would have been eligible for 212(c) relief before subsequent legislation restricted and then eliminated it, reasoning that various constitutional rights and protections had been, in effect, traded for a plea of guilty for a crime for which 212(c) relief could statutorily be granted. INS v. St. Cyr, 533 U.S. 289, 325–26 (2001). In cases of pleas of guilt, reliance upon the availability of 212(c) relief was presumed; where the lawful permanent resident had not entered into a plea agreement, the circuits have split and remain so. *See e.g.,* Carranza-De Salinas v. Gonzales, 477 F.3d 200, 209 (5th Cir. 2007) (requiring a showing of actual reliance on 212(c) relief where a lawful permanent resident did not enter into a plea agreement and instead delayed adjudication of the case); Restrepo v. McElroy, 369 F.3d 627, 633 (2d Cir. 2004) (finding 212(c) relief available where a lawful permanent resident was convicted of an "aggravated felony" following a trial while relief was available, but delayed affirmatively applying for 212(c) relief); Dias v. INS, 311 F.3d 456, 457 (1st Cir. 2002) (finding that where a lawful permanent resident actually proceeded to trial, 212(c) relief under *St. Cyr* was not available); *but see, e.g.*, Atkinson v. Att'y Gen., 479 F.3d 222, 227–28 (3d Cir. 2007) (holding that a showing of actual reliance is not necessary for 212(c) relief to be available to a lawful permanent resident convicted following a trial). Following *St. Cyr*, the BIA resurrected the "analogous counterpart" logic of *Wadud* to find that for lawful permanent residents able to file for 212(c) relief after the 1996 repeal, a "statutory counterpart" for the charged ground of deportability must exist within the grounds of inadmissibility); *In re* Blake, 23 I&N Dec. 722, 729 (B.I.A. 2005) (finding that where a crime, in this case the sexual abuse of a minor, was charged as an "aggravated felony", no statutory counterpart existed, thus 212(c) relief was unavailable, despite the respondent having plead guilty before the repeal of 212(c) relief); *In re* Meza, 20 I&N Dec. 257, 259 (B.I.A. 1991) (finding that where a crime involving narcotics formed a ground of deportability as an "aggravated felony", the nature of the crime—narcotics—could also form the basis of a ground of inadmissibility, thus 212(c) relief was appropriate). *Blake* was later codified to disallow 212(c) relief where "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a *statutory counterpart* in section 212 of the Act." 8 C.F.R. § 1212.3(f)(5) (2011) (emphasis added). Since that time, numerous challenges have reached the circuits, attempting to argue that many crimes charged as an "aggravated felony" (which itself exists as a ground of deportability, but not as a ground of inadmissibility) could also constitute a "statutory counterpart" to a CIMT, which *does* exist as the predicate for a ground of inadmissibility and is therefore included within 212(c) relief. *See e.g.,* Thap v. Mukasey, 544 F.3d 674, 678–79 (6th Cir. 2008) ("If someone was found deportable on two different grounds, waiver of one would hardly avoid the other"); Caroleo v. Gonzales, 476 F.3d 158, 166–67 (3d Cir. 2007) (finding that a criminal conviction for attempted murder constituted a crime of violence, which is ineligible for 212(c) relief, and that crimes of violence and CIMTs are not statutory counterparts for purposes of 212(c) relief); Brieva-Perez v. Gonzales, 482 F.3d 356, 359, 362 (5th Cir. 2007) (finding that the unauthorized use of a vehicle was a crime of violence with no statutory counterpart for 212(c) relief); Vue v. Gonzales, 496 F.3d 858 (8th Cir. 2007) (finding no statutory counterpart for an assault conviction); Kim v. Gonzales, 468 F.3d 58, 62 (1st Cir. 2006) (finding that a criminal conviction for voluntary manslaughter, constituting an "aggravated felony" as a "crime of violence" was not a "statutory counterpart" to a CIMT for purposes of 212(c) relief). The usually liberal Ninth Circuit has taken the view that *Francis* was wrong; 212(c) relief can never apply to a lawful permanent resident who has not left the country and returned. *See* Abebe v. Mukasey, 554 F.3d 1203, 1206 (9th Cir. 2009) ("By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting

under Section 212(c) are now limited to lawful permanent residents who pleaded guilty to an "aggravated felony" on or before April 24, 1996,[249] or to one or more CIMTs on or before April 1, 1997. This Section 212(c) relief is not available where the lawful permanent resident was convicted and sentenced to more than five years in prison after November 29, 1990, the passage date of IMMACT 90. Needless to say, these restrictions have substantially limited the ability of immigration judges to grant relief from removal to lawful permanent residents convicted of certain crimes. By eliminating available waivers for the grounds of deportability, immigration judges are stripped of their ability to halt what then become mandatory deportations.

In addition to statutory changes restricting the ability of immigration judges to waive deportation; structural changes to the immigration court system raise concerns of conflicts of interest, impartiality, and even the binding nature of immigration judges' decisions. For instance, DHS is not required to honor an immigration judge's bond determination in the case of an alien for whom DHS had first set a bond of $10,000 or more.[250] Perhaps more troubling, DHS is not bound by an immigration judge's

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these aliens."). Ironically, only the Second Circuit, hearing the appeal of the *Blake* case which established the "statutory counterpart" requirement in post-repeal 212(c) relief, declined to follow the narrow interpretation of "statutory counterpart" followed by the other circuits and promulgated in the C.F.R., instead holding that "[i]f the offense that renders a lawful permanent resident deportable would render a similarly situated lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation." Blake v. Carbone, 489 F.3d 88, 103 (2d Cir. 2007). In the last weeks of 2011, the Supreme Court in *Judulang v. Holder* unanimously struck down the BIA's "statutory counterpart" requirement, explaining that:

> By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner . . . The BIA may well have legitimate reasons for limiting § 212(c)'s scope in deportation cases. But still, it must do so in some rational way. If the BIA proposed to narrow the class of deportable aliens eligible to seek § 212(c) relief by flipping a coin—heads an alien may apply for relief, tails he may not—we would reverse the policy in an instant. That is because agency action must be based on non-arbitrary, " 'relevant factors,' " which here means that the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system. A method for disfavoring deportable aliens that bears no relation to these matters—that neither focuses on nor relates to an alien's fitness to remain in the country—is arbitrary and capricious.

Judulang v. Holder, 565 U.S. __, 132 S. Ct. 476, 484-85 (2011).

249. *See St. Cyr*, 533 U.S. at 292–93, 326 (2001) (holding that § 212(c) relief may still be granted if it would have been available at the time of making the plea, thereby diminishing the harshness of the effects of AEDPA, and IIRIRA).

250. 8 C.F.R. § 1003.19(i)(2).

determination that an alien is actually a U.S. citizen and thus immune from removal.[251]

These contradictions are explained in part by the complicated structure of the immigration court system. In 2002, DHS was created and assumed the functions of the Immigration Naturalization Service (INS),[252] which was previously within the purview of the Department of Justice (DOJ), led by the U.S. Attorney General.[253] In an effort to maintain a degree of independence, the Executive Office for Immigration Review (EOIR) was left within the DOJ, and thus immigration judges employed by the nation's fifty-two immigration courts work under the supervision of the Office of the Attorney General.

Through its ICE agency, DHS employs trial attorneys who prosecute aliens on behalf of the government before the immigration court and the Board of Immigration Appeals (BIA). However, when immigration cases are appealed to the Circuit Courts of Appeals, or the Supreme Court, the government is instead represented by the Office of Immigration Litigation (OIL), an office within the DOJ. Thus, at various times the DOJ and the Attorney General serve in the role of both prosecutor and the trier of facts. The inherent conflict of interests presented by this structure has caused concern for some time, and has resulted in several bills introduced before Congress to establish an independent immigration court.[254]

C. *Unintended Consequences and Miscarriages of Justice*

1. Deporting United States Military Veterans

> You come back from Iraq or Afghanistan today, you have put yourself on the line for this country. An incredible number of kids come

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251. *See* Minasyan v. Gonzalez, 401 F.3d 1069, 1074 n.7. (9th Cir. 2005) ("[T]he BIA noted that the IJ did not have jurisdiction to reconsider the INS's denial of Minasyan's citizenship claim").

252. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(a), 116 Stat. 2142, (codified as amended at 6 U.S.C. § 111 (2002)); § 441, 116 Stat. 2192, (codified as amended at 6 U.S.C. § 251 (2002)), § 471(a), 116 Stat. 2205 (codified as amended at 6 U.S.C. § 291) (2002)).

253. *See New Data on the Processing of Aggravated Felons*, TRAC IMMIGRATION (Jan. 5, 2007), http://trac.syr.edu/immigration/reports/175/ [hereinafter TRAC IMMIGRATION, *New Data*] (discussing the players in various types of removal proceedings).

254. Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, Jan. 1, 2008. Additionally, three bills have been introduced before Congress to establish an Article I immigration court system. *See* United States Immigration Court Act of 1999, H.R. 185, 106th Cong. (1999); United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. (1998); United States Immigration Act of 1996, H.R. 4258, 104th Cong. (1996).

> back with an injury or illness that puts them in trouble with the law. To simply have these people deported is not a good way to thank them for their service.
>
> Rep. Bob Filner (D-Cal.) (2010)[255]

Non-citizen aliens have served the United States in all the branches of our military since before the creation of the grounds of deportability and thousands of aliens and naturalized citizens continue to serve proudly today.[256] More than twenty percent of persons who have received the Congressional Medal of Honor have been immigrants.[257] In 2010, it was reported that nearly 17,000 non-citizen aliens were currently on active duty[258] and that according to data from the Department of Defense released in February 2008, foreign-born service members (including both aliens and naturalized citizens) made up five percent of the total military population.[259]

Yet military service does not prevent the deportation of alien service members and veterans. Although there are no official government figures regarding the number of veterans who have been deported, advocates estimate thousands of former service members have been deported from the United States and that an additional 3,000 are currently facing deportation.[260] In 2002, an executive order signed by President George W. Bush allowed for the naturalization process of aliens on active duty to be expedited,[261] but naturalization of military service members is not automatic and alien service members and veterans remain subject to depor-

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255. Barbassa, *supra* note 46 (quoting Representative Bob Filner (D-Cal.), chairman of the House Veterans' Affairs Committee).

256. ANITA U. HATTIANGADI ET AL., CNA'S INST. FOR PUB. RESEARCH, NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 19 (Apr. 2005). On June 10, 2011, Nigerian-born Captain Ademola D. Fabayo and Mexican-born Staff Sergeant Juan J. Rodriguez-Chavez were both awarded the Navy Cross for their actions while serving in Afghanistan. Press release, Marine Corps Base Quantico Public Affairs, Marines receive Navy Cross (June 12, 2011) (available at http://www2.insidenova.com/news/2011/jun/12/marines-receive-navy-cross-ar-1102007/).

257. Stuart Anderson, *A Veteran's Day Remembrance: Immigrant Medal of Honor Recipients,* CATO.ORG (Nov. 4, 1996), *available at* http://www.cato.org/pub_display.php?pub_id=6269.

258. Barbassa, *supra* note 46.

259. WE ARE ONE AMERICA, SPOTLIGHT ON THE CULTURAL AND ECONOMIC CONTRIBUTIONS OF IMMIGRANTS: IMMIGRANTS IN THE MILITARY 1 (2010), http://weareoneamerica.org/sites/default/files/OneAmercaFactSheet_Immigrants_in_the_Military.pdf.

260. Francisco Miraval, *Deportation of Hispanic War Veteran Brothers Postponed,* FOX NEWS LATINO (Jan. 6, 2011), http://latino.foxnews.com/latino/news/2011/01/06/deportation-hispanic-war-veteran-brothers-postponed/.

261. Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 3, 2002) (the order is entitled *Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism*).

tation until they become citizens. Worse, some aliens who served in the military were mistakenly told that they had been automatically naturalized, only to discover later that they remained deportable aliens.[262] If an alien veteran is convicted of an "aggravated felony" after November 29, 1990, he is permanently rendered ineligible for naturalization;[263] conviction of an "aggravated felony" at any time also causes him to remain deportable.

That veterans would find themselves convicted of the types of crimes likely to trigger deportability is not surprising. A 2008 study found that 300,000 veterans of the wars in Iraq and Afghanistan likely suffer from Post-Traumatic Stress Disorder (PTSD),[264] and data released by the Department of Veterans Affairs (VA) in 2010 concludes that PTSD can lead to lifestyle choices among veterans that increase the instances of criminal

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262. Banished Veterans, an organization formed to raise awareness of the issue of deported military veterans, maintains a list of members who have been removed. *List and Stories of Veterans Facing Deportation and Deported Veterans*, BANISHED VETERANS, http://www.banishedveterans.info/donations.html (last visited Feb. 5, 2012). Among the veterans profiled is Rohan Coombs, a native of Jamaica who served in the Persian Gulf as a member of the U.S. Marine Corp. While on active-duty, Coombs applied to naturalize but was told that he was already a citizen by virtue of his military service. After leaving the Marines, he is now in removal proceedings for a marijuana conviction. *See id.* (click on the link to "Rohan's Story" at the top of the page).

263. To naturalize and become a U.S. citizen, an alien must be able to demonstrate that he is, and has been, a person of good moral character for a certain statutorily defined period of time, generally three or five years. INA § 316(a), (e), 8 U.S.C. § 1427(a), (e) (2006). Aliens convicted of an "aggravated felony" are statutorily unable to ever be found to have "good moral character," regardless of when the conviction occurred. *Id.* at INA § 101(f), 8 U.S.C. § 1101(f). Thus, an alien convicted of an "aggravated felony" is not able to naturalize and become a U.S. citizen. Military service does not alter this. Adjudicators of naturalization applications are specifically instructed to watch for applicants who have committed "aggravated felonies." Guidance on the topic appearing in the Citizenship and Immigration Services' Adjudicator's Field Manual reads:

> For naturalization purposes, an applicant convicted of an aggravated felony on or after November 29, 1990, regardless of when the crime was committed, is permanently precluded from establishing good moral character. Accordingly, an application for naturalization filed by an individual convicted of an aggravated felony on or after November 29, 1990, must be denied. *Moreover, the case should be considered for possible initiation of removal proceedings because an individual convicted of an aggravated felony at anytime is removable*.

Adjudicator's Field Manual 73.6(d)(1), U.S. CITIZENSHIP & IMMIGR. SRVS., http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-22380/0-0-0-22999.html (last visited Feb. 5, 2012) (emphasis added).

264. *PTSD, depression afflict 300,000 Iraq, Afghan war vets: study*, AGENCE FRANCE-PRESSE ENGLISH WIRE (Apr. 17, 2008), http://afp.google.com/article/ALeqM5hKB_9s6nhAqu-W-kkpfSRuv-3BGA.

and aggressive behavior.[265] The VA also reports that ethnic minority veterans are dramatically more likely to suffer from PTSD than their White counterparts.[266] The Bureau of Justice Statistics estimates that in 2004, 140,000 veterans were incarcerated in our nation's prisons, forty-six percent for narcotics offenses,[267] which also constitutes the largest ground for which aliens are removed from the United States. The same data set also found that veterans were twice as likely as non-veterans to be incarcerated for sexual crimes.[268]

In response to this problem, specialized veteran's courts were created, the first of which began in 2008 in Buffalo, New York as the brain-child of Judge Robert Russell; twenty-two other cities have since created their own veteran's courts.[269] The VA has also begun reaching out to courts in an effort to help PTSD-afflicted veterans get treatment and avoid jail time.[270] These efforts and others are recognition by the government and our justice system that veterans deserve additional assistance and discretion. Why then is this type of discretion not provided to alien veterans facing removal?

> There are numerous examples of immigrants [in the armed services] who have already given their lives. . . . I'm hopeful that at the end of the immigration debate, we can show the American people that we addressed a serious and urgent problem with sound judgment, honesty, common sense, and compassion.
>
> Sen. John McCain (R-Az.) (2010)[271]

Deporting those who have served our country may offend our collective sensibilities, but with current laws in place, immigration judges' hands are often tied. As discussed previously in this Comment, for many crimes, removal of the alien is outside the immigration judge's control.

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265. *Criminal Behavior and PTSD: An Analysis,* U.S. DEPARTMENT OF VETERANS AFFAIRS (June 6, 2010), http://www.ptsd.va.gov/professional/pages/criminal-behavior-ptsd.asp.

266. Chalsa M. Loo, *PTSD Among Ethnic Minority Veterans*, U.S. DEPARTMENT OF VETERANS AFF. (June 6, 2010), http://www.ptsd.va.gov/professional/pages/ptsd-minority-vets.asp.

267. DRUG POLICY ALLIANCE, HEALING A BROKEN SYSTEM: VETERANS BATTLING ADDICTION AND INCARCERATION 2–3 (2009), *available at* http://www.phoenixhouse.org/wp-content/uploads/2010/12/DPA_IssueBrief_Veterans.pdf.

268. *Study: More Vets in Prison for Sex Crimes,* USA TODAY (May 21, 2007), http://www.usatoday.com/news/washington/2007-05-20-vets-sex-crimes_N.htm.

269. Dahlia Lithwick, *A Separate Peace*, SLATE (Feb. 11, 2010), http://www.slate.com/id/2244158/.

270. Daniel Woolfolk, *VA Reaches Out to Courts to Help Veterans With PTSD,* WATERTOWN DAILY TIMES (New York), Sept. 18, 2011, http://www.watertowndailytimes.com/article/20110918/NEWS03/709189833.

271. WE ARE ONE AMERICA, *supra* note 259 (quoting Senator John McCain).

Recent ICE memoranda specifically calls for "prosecutorial discretion" for certain aliens, and includes as a factor to be considered "whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat."[272] While prosecutorial discretion for alien veterans is an encouraging sign, such discretion only operates to reduce or prevent ICE prosecution of certain aliens but does not cure the underlying grounds of deportability, nor offer a path to overcome these grounds and naturalize. Clearly, a more permanent solution is needed.

2. Deporting Children Adopted From Abroad

Although reportedly less common than the deportation of alien veterans and alien service members, foreign-born children adopted from abroad face deportation in cases where their naturalization was never completed by their adoptive parents. The Child Citizenship Act of 2000 (CCA), grants essentially automatic citizenship to adopted children who enter the United States as lawful permanent residents,[273] however, unlike the definition of "aggravated felony," CCA does not apply retroactively to bestow citizenship to adopted children who entered and turned eighteen before the Act became effective on February 27, 2001. When these adopted lawful permanent residents are convicted of deportable offenses, a lack of available discretion on the part of trial judges or immigration judges renders their removal mandatory—often to countries they cannot remember and where they have no known family.

"When they sent him away, I knew I would never see him again," James Herbert told a reporter in 2004 after his adopted son Joao was deported to Brazil.[274] Convicted in 2000 of trying to sell marijuana to an undercover officer shortly after graduating from high school, Joao became an "aggravated felon" under IIRIRA, was ineligible for 212(c) relief under AEDPA, and already too old to become a citizen under

272. Memorandum from John Morton, *supra* note 27.

273. Child Citizenship Act of 2000, Pub. L. No 106-395, § 101, 114 Stat. 1631, 1631.

274. Terry Oblander, *Couple Mourn Deported Son, 26; Man Gunned Down in Native Brazil; He was Adopted at 8,* PLAIN DEALER (Cleveland), May 28, 2004, at B1. POUND PUP LEGACY, a website formed to raise awareness of issues including the deportation of foreign-born adoptees, maintains a list of foreign-born adopted children who have faced deportation from the United States. POUND PUP LEGACY, http://poundpuplegacy.org/deportation_cases (last visited Feb. 5, 2012) (providing lists of foreign-born children who were adopted but subsequently deported).

CCA.[275] Returned to Brazil for the first time since he was adopted at the age of eight, Joao was later shot to death.[276]

Jess Mustanich was adopted from El Salvador in 1978 and grew up in the United States as a lawful permanent resident.[277] Although his father James Mustanich made repeated attempts to apply for his naturalization, various errors on the part of Legacy INS prevented the acceptance of his application.[278] A few months after Jess turned eighteen, he was convicted of first-degree burglary and sent to prison.[279] In 2003, Jess was charged as an "aggravated felon" under the IIRIRA definition and ordered removed.[280] In denying his petitions to terminate removal proceedings, for asylum, for withholding of removal and for protection under the Convention Against Torture (CAT), the Ninth Circuit wrote, "[a]lthough we sincerely lament that Mustanich and his family were not better served by the representatives of the United States from whom they repeatedly sought assistance, we are bound by the law as declared by the Supreme Court, and must reject his argument."[281] Jess was deported to El Salvador in July of 2008.[282]

While the CCA alleviates the risk of deportation of foreign-born adopted children who entered the United States after it became effective, children who entered before remain deportable and continue to face deportation.[283] The passage of the CCA is a clear recognition that these

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275. Gina Mace & Marilyn Miller, *Citizenship Bill Too Late for Inmate: Wadsworth Man Awaits Deportation for Drug Charge,* POUND PUP LEGACY (Oct. 19, 2000), http://poundpuplegacy.org/node/28440.

276. Marilyn Miller & Gina Mace, *Deported Man Shot to Death in Brazil: Wadsworth Graduate Joao Herbert Shot to Death in Slum Where he Taught,* POUND PUP LEGACY (May 27, 2004), http://poundpuplegacy.org/node/28404.

277. Mustanich v. Mukasey, 518 F.3d 1084, 1086 (9th Cir. 2008).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 1087.

282. Leslie Berestein, *U.S. Adoptee a Stranger in His Birthplace; Burglary Conviction Leads to Deportation,* SAN DIEGO UNION-TRIBUNE, July 20, 2008, at B1.

283. *See e.g.*, Edward Hegstrom, *Adoption Snag Could Lead to Deportation,* HOUSTON CHRONICLE, Oct. 4, 2002, http://www.chron.com/news/houston-texas/article/Adoption-snag-could-lead-to-deportation-2085286.php (reporting on adoptee Christopher Clancy, who faced deportation to Mexico following an arrest for burglary; Clancy's parents had tried to file for their son's naturalization, but were erroneously told by Legacy INS that their son was already a U.S. citizen); Amy Herdy, *Son Returned to Unfamiliar Land,* ST. PETERSBURG TIMES, Feb. 23, 1999, at 1A (discussing adoptee John Gaul III, who was deported to Thailand, despite the fact that his parents had applied for his naturalization years before); Corina Knoll, *Korean American Adoptee Faces Deportation,* NEW AM. MEDIA (Jul. 11, 2003), http://news.newamericamedia.org/news/view_article.html?article_id=e24f232a39a1e7f5db3b9ae339d7d3b8 (discussing adoptee Aaron Billings, who faced deportation to Korea, and his release under orders of supervision after two years in detention following

adopted children are, in most respects, American. However, without discretion available to halt their removals, as non-citizen aliens, they remain deportable.[284]

3. Standing Alone Among First-World Nations: Deporting Lawful Permanent Resident Parents, Spouses, and Children of U.S. Citizens

> As I have said before, "I pray that soon the good men and women in our Congress will ameliorate the plight of families like the [petitioners] and give us humane laws that will not cause the disintegration of such families."
>
> Judge Harry Pregerson, *Memije v. Gonzalez* (2007)[285]

The 64th Congress, the original authors of both the first crime-based grounds of deportability and the provision creating JRAD discretion for trial judges, recognized the need for the JRAD discretionary provision, to prevent levying "too harsh" a penalty upon an "unfortunate man" when considering all the relevant circumstances.[286] Perhaps ironically, the separation of an alien from his citizen family was exactly the "harsh" circumstance contemplated by lawmakers.[287] Today, hardship to citizen family cannot be considered in cases where discretion has been eliminated.

A 2010 report by the University of California found that between 1997 and 2007, the deportation of lawful permanent residents left as many as 100,000 children in the United States without a parent.[288] A similar study conducted by Human Rights Watch, analyzing ICE data obtained after a

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a misdemeanor arrest for selling marijuana); Stephanie Siek, *Germany's 'Brown Babies': The Difficult Identities of Post-War Black Children of GIs,* SPIEGEL ONLINE (Oct. 13, 2009), http://www.spiegel.de/international/germany/0,1518,druck-651989,00.html (discussing adoptee and U.S. military veteran Rudi Richardson deported to Germany following arrests for drug use and petty theft. Adopted in 1955, Richardson was deported in 2003); Rebecca Walsh, Editorial, *Meth, Adoption, Deportation,* SALT LAKE TRIB., July 27, 2008, http://www.sltrib.com/news/ci_10011361 (discussing adoptee Kairi Shepherd, who is facing deportation to India—where she was adopted at three months old).

284. Vandello, *supra* note 247, at 771. Judge Vandello writes:

> I see cases such as that of a young man who has been in the United States since he was six months old and is now facing deportation to the Philippines, a country he knows virtually nothing about. And there is absolutely no possibility of his remaining in the United States.

Id.

285. Memije v. Gonzales, 481 F.3d 1163, 1165–66 (9th Cir. 2007) (Pregerson, J., dissenting) (quoting Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1015 (9th Cir. 2005)).

286. 53 CONG. REC. 5169 (1916) (statement of Rep. Adolph Sabath).

287. *Id.*

288. INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL., BERKELEY, SCH. OF LAW, ET. AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMI-

two-year Freedom of Information Act (FOIA) battle, found that between 1997 and 2007, 1,012,734 people lost a family member to deportation.[289] Both studies advocated strongly for a return of judicial discretion, which would allow the consideration of factors including family members in the United States and the hardship those persons would face if the alien were removed. These studies and others contrast the lack of judicial discretion in cases in which aliens are removed from the United States with the type of discretion afforded to aliens facing removal from other First-World countries.[290]

In failing to afford judges the exercise of discretion based on harmful effects deportation may cause to an alien's family, the United States stands somewhat alone. While allowing for the removal of the equivalent of lawful permanent residents, the European Union requires that member states must consider factors including family ties and hardship to family members before deporting a resident alien.[291] The European High Court of Human Rights has also held that such deportations are only justified when a threat to public safety or the public interest outweighs the destructive effect the removal will have on the alien's family.[292] Canada created its own version of the United States' 1996 immigration reforms in the Immigration and Refugee Protection Act (IRPA), enacted in

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GRANT PARENT TO DEPORTATION 4 (March 2010), *available at* http://www.law.berkeley.edu/files/Human_Rights_report.pdf [hereinafter INT'L HUMAN RIGHTS LAW CLINIC].

289. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS), *supra* note 224.

290. The Human Rights Watch study also notes that the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States, provides:

> "[a]n Alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, Ratifications and Reservations for the International Covenant on Civil and Political Rights, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en art. 13. For a more detailed explanation of ICCPR in the context of American criminal law see Terrence Rogers, *Using International Human Rights Law to Combat Racial Discrimination in the U.S. Justice System,* 14 SCHOLAR 375 (2011); *see also* Adam Collicelli, Note, *Affording Discretion to Immigration Judges: A Comparison of Removal Proceedings in the United States and Canada,* 32 B.C. INT'L & COMP. L. REV. 115, 117 (2009) (contrasting the removal process of the United States with Canada).

291. Council Directive 2003/109/EC (2003) concerning the status of third-country nationals who are long-term residents.

292. Berrehab v. the Netherlands, 138 Eur. Ct. H.R. ¶ 29 (ser.A) (1988); Mehemi v. France, 1997-VI Eur. Ct. H.R. ¶ 31 (1959).

2001.[293] Although IRPA did strip some degree of discretion from Canadian courts, it still left the reviewing judicial body, the Immigration and Refugee Board Appeal Division, with the ability to exercise discretion and prevent removal on "humanitarian and compassionate" grounds, but only if the court "has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations."[294]

Various solutions have been proposed to bring the position of the United States more in line with other First-World nations' immigration policies on this point. One such suggestion is the Child Citizen Protection Act (CCPA), which was re-introduced to Congress in January of 2011 to the 111th Congress as H.R. 250 by author Rep. Jose Serrano (D-NY).[295] This legislation suggests amending the INA to authorize immigration judges to exercise discretion in the removal of the alien parent of a citizen child. At the time of publication, this legislation has not been passed.

4. The Need for Discretion

> Immigration policy should be generous; it should be fair; it should be flexible. With such a policy we can turn to the world, and to our own past, with clean hands and a clear conscience.
>
> President John F. Kennedy[296]

Of the 168,532 persons deported in 2010 as "criminal aliens,"[297] it is difficult to imagine that none of their cases involved circumstances deserving of a judge's consideration and, potentially, discretionary relief. While this number reflects every person removed from the United States

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293. Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.), *available at* http://laws.justice.gc.ca/eng/acts/I-2.5/FullText.html.

294. *Id.*

295. The Child Citizen Protection Act as previously been introduced by Rep. Jose E. Serrano (D-N.Y.) would have amended INA § 240(c)(4) and 8 U.S.C. § 1229a(c)(4) to include:

> D) DISCRETION OF JUDGE IN CASE OF CITIZEN CHILD- In the case of an alien subject to removal, deportation, or exclusion who is the parent of a child who is a citizen of the United States, the immigration judge may exercise discretion to decline to order the alien removed, deported or excluded from the United States if the judge determines that such removal, deportation, or exclusion is clearly against the best interests of the child, except that this subparagraph shall not apply to any alien who the judge determines—(i) is described in section 212(a)(3) or 237(a)(4); or (ii) has engaged in conduct described in paragraph (8) or (9) of section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102).

Child Citizen Protection Act H.R. 1176, 110th Cong. (introduced Feb. 16, 2007) *available at* http://www.opencongress.org/bill/110-h1176/text.

296. JOHN F. KENNEDY, A NATION OF IMMIGRANTS 50 (Harper Perennial, 2008).

297. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 23, at 94, 102.

on crime-based grounds and not solely those removed on grounds for which little or no discretion exists, it is important to remember that mandatory removal as an "aggravated felon" generally applies only to lawful permanent residents since it is a ground of deportability,[298] and undocumented aliens are generally charged under grounds of inadmissibility,[299] which do not include provisions requiring mandatory removal. Considering the likelihood that removed lawful permanent resident aliens had families in the United States, and significant community ties, including in some cases prior military service, the case for discretion seems clear.

The four listed purposes of IIRIRA are to: (1) "increase control over immigration to the United States," (2) expedite the removal of aliens, "especially criminal aliens," (3) reduce abuse of asylum and parole, and (4) effect a reduction in the use of welfare and government benefits by aliens.[300] AEDPA's stated purpose is "[t]o deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes."[301]

Although perhaps in line with IIRIRA's goal of expediting the removal of criminal aliens, in application, these laws seem to have other effects contrary to the stated goals. Does the banishment of veteran aliens, trained in the use of weapons and other military matters, to countries with dangerous militia-style drug cartels such as Mexico help to deter terrorism?[302] Is terror discouraged by deporting an active duty U.S. Army Sergeant to a country in the Arab world?[303]

Is justice provided for crime victims when the aliens convicted of those crimes are deported from the United States *after* the completion of their sentences? At that point, has justice not been served? What possible justice can deporting an alien provide a crime victim when the deporta-

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298. *See* INA § 237(a), 8 U.S.C. § 1227(a) (2006) (indicating the various categories where removal is possible for an alien admitted to the United States).

299. INA § 212(a), 8 U.S.C. § 1182(a).

300. S. REP. NO. 104-249, at 2 (April 10, 1996).

301. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214.

302. Among the U.S. armed forces veterans who have been ordered deported to Mexico are Fabian Rebolledo, Fernando Cervantes, Hector Lopez, Victor Pardida, Gerardo E. Lopez Flores, Eduardo Agustin Garcia, and Oscar Sanchez. *See* BANISHED VETERANS, *supra* note 262.

303. *See* Ed Pilkington, *Arab-American Paratrooper Faces Deportation After Afghan Service,* GUARDIAN, Dec. 2, 2007, http://www.guardian.co.uk/world/2007/dec/03/usa.edpilkington (reporting on efforts to deport an active duty member of the U.S. Army, Sgt. Hicham Benkabbou to Morocco). Benkabbou was served with a notice to appear (NTA) in removal proceedings while he was on active duty in Afghanistan with the 508th parachute infantry regiment. *Id.*

tion is triggered not at the time of the crime, but by the alien returning home from a trip abroad, years after his conviction for the offense?[304]

The 64th Congress, while drafting the original JRAD provision, crafted the legislation as it did after contemplating a case where an alien otherwise removable for his crimes, might leave behind a citizen spouse and children.[305] It seems strange that while this consideration governed Congress's decision to include discretion in the first legislation to authorize removal of legally admitted aliens, subsequent legislation no longer considers this matter a concern. Where the alien is not the spouse or parent of citizens, but is instead the adopted child, the need for discretion becomes even clearer.

To the extent that preventing trial judges from recommending against deportation and eliminating the ability of immigration judges to prevent removal when circumstances warrant leniency serve the goal of expediting the removal of "criminal aliens," these actions do nothing to further the other objectives of either piece of legislation. Immigration "to" the United States is not controlled by the removal of aliens previously admitted for lawful permanent residence, nor does it reduce applications for asylum or parole.[306] Deporting the parents of 100,000 children is unlikely to effectuate a reduction in the need for government benefits and welfare. And sadly, in the case of some deported aliens, the only "effective death penalty" their removal supports is their own.[307]

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304. *See* Mirta Ojito, *Immigrant Fights Off His Deportation,* N.Y. TIMES, Sept. 4, 1998, http://www.nytimes.com/1998/09/04/nyregion/immigrant-fights-off-hisdeportation.html?pagewanted=all&src=pm (reporting on Jesus Collado-Munoz, detained at Kennedy International Airport and placed in removal proceedings more than twenty years after a misdemeanor offense for having consensual sex with his then under-age girlfriend); *No Justice for Immigrants-Abuses of 1996 Immigration Law,* FIND ARTICLES, http://findarticles.com/p/articles/mi_m1295/is_n11_v61/ai_19952804/?tag=content;col1 (last visited Feb. 5, 2012) [hereinafter *No Justice*] (reporting on the removal proceedings of Jesus Collado-Munoz). The article, originally published in November of 1997 in *The Progressive*, noted that the mother of Collado-Munoz's then under-age girlfriend wrote to authorities after he was detained, "pleading for his release and explaining that 'Jesus is not a criminal nor a violent or immoral person."' *Id.* When considered by the 64th Congress, the deportation of aliens was assumed to properly occur immediately after the completion of the alien's criminal sentence. "Mr. Mann: As a matter of curiosity, where one of these aliens commits a crime that subjects him to deportation, when is he deported? Mr. Burnett: My idea is that is it done after the expiration of the sentence." 53 CONG. REC. 5168 (1916).

305. *Id.* (statement of Rep. Adolph Sabath) ("Mr. Sabath: We may very likely have cases where a man has married within five years after his arrival in this country. He may have married an American woman and may have children. What will become of his wife and his children if he is deported?").

306. To the contrary, ordering the removal of long-term lawful permanent residents to countries they may not have any ties to often triggers petitions for asylum. Mustanich v. Mukasey, 518 F.3d 1084, 1087 (9th Cir. 2008).

307. Hall, *supra* note 32.

Discretion must be provided to avoid deportation in cases where the benefits of removing an alien for his criminal conduct are outweighed by other, more compelling interests. A return to JRAD, allowing trial judges to offer their recommendations against deportation, will allow those most familiar with the alien's actions, his degree of culpability for the crime, and other factors to decide whether he is deserving of leniency.[308] Although deportation is a civil penalty, it is clear that the issuance of a recommendation against deportation by the trial judge is part of the sentencing process, and therefore should be left to the discretion of the trial court.[309]

In addition, discretionary authority should be returned to immigration judges. Writing in 2002 to advocate for an independent immigration court, the president and vice presidents of the National Association of Immigration Judges wrote, "[t]he collective expertise of our corps in this complex and highly specialized area of law is unparalleled. Our perspective is non-partisan, and has been forged in the trenches where the battles are being waged."[310] Without analyzing the qualifications of the immigration court bench, it is fair to say that the expertise of immigration judges in the area of immigration law, likely exceeds that of the members of Congress.[311] That they are less partisan than Congress goes without saying. To fail to utilize the resource that immigration judges' expertise and judgment in this area constitutes, and instead substitute the presumably well-intentioned but clearly less expert opinions of elected politi-

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308. 53 CONG. REC. 5171 (1916).

> When the alien is before the judge charged with a crime and the time for a sentence comes, necessarily the question of whether he shall be deported or not must be presented to the court, and when all the facts are before him, and after both sides have been heard by the court, that is the time when that important matter should be decided.

Id. (statement of Rep. Everis Anson Hayes, R-Cal.).

309. Janvier v. United States, 793 F.2d 449, 452–53 (2nd. Cir. 1986).

310. Hon. Dana Marks Keener & Hon. Denise Noonan Slavin, AN INDEPENDENT IMMIGRATION COURT: AN IDEA WHOSE TIME HAS COME, A POSITION PAPER BY THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES (Jan. 2002), *available at* http://www.woodrow.org/teachers/esi/2002/CivilLiberties/Projects/PositionPaperImmigrationJudges.pdf.

311. Sen. Harry Reid later referred to IIRIRA as "[a] terrible mistake made by the Congress in 1996." *See* 146 CONG. REC. 5389 (Apr. 12, 2000) (statement of Sen. Reid, D-Nev.). Rep. Bill McCullom also commented:

> [I]n 1996, Congress made several modifications to our country's immigration code that have had a harsh and unintended impact on many people living in the United States. These individuals, permanent resident aliens, have the legal right to reside in this country and apply for U[.]S[.] citizenship. They serve in the military, own businesses and make valuable contributions to society.

145 CONG. REC. 23794 (Oct. 4, 1999) (statement of Rep. Bill McCollum, R-Fla.).

cians[312] seems wasteful and contrary to common sense. We should instead allow immigration judges to draw upon the legal expertise and good judgment for which they were appointed to the bench by returning their authority to exercise discretion when the case warrants it. As Senator Sabath told the 64th Congress, "no judge would deliberately order that deportation be not made unless there was good reason for it."[313]

V. Extending the Constitution and Common Sense to Solve Problems Caused by Current Immigration Laws

As discussed in Part IV of this Comment, the changes brought by the 1996 legislation and by enforcement policies have resulted in a backlog of more than 300,000 immigration cases pending before our nation's immigration courts.[314] Part IV discussed how restoring judicial discretion to trial judges to recommend against deportation could prevent cases from being brought before immigration courts in the first place, and how restoring discretion to immigration judges to halt deportation could help to apply this harsh punishment in only the most egregious cases. However, reducing the flow of removal cases into our immigration courts for contemporary and future crimes is only part of the total problem. This Part discusses cases of lawful permanent residents facing immigration-prosecution and removal for criminal conduct committed long ago. And it addresses how recent case law suggests a trend toward recognizing deportation as punishment for a crime—a change that could lead to greater constitutional protections in removal hearings and to the end of retroactively applicable immigration laws. Part V further addresses the effects of retroactivity in the context of deportation of long-term lawful permanent residents and explores the need to end retroactivity, or alternatively, create a statute of limitation for commencing removal proceedings for an old criminal conviction known to the government.

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312. Members of Congress and indeed the President are elected officials, but were not elected by the persons most affected by this legislation: aliens. Only U.S. citizens may legally vote for Congressional leaders and the President; citizens are not subject to deportation. This reduces the motivation of Congress to adequately consider the effect of legislation on non-citizen aliens, including lawful permanent residents. For a discussion of this topic see Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review,* 78 Tex. L. Rev. 1615 (June 2000).

313. 53 Con. Rec. 5165, 5169.

314. Gleason, *supra* note 20.

A. *Non-Citizen Aliens, Immigration Laws, and Limited Constitutional Protections*

> "Congress regularly makes rules that would be unacceptable if applied to citizens."
>
> Chief Justice Rehnquist, *Demore v. Kim* (2003)[315]

On April 24, 1996, the effective date of AEDPA, Congress waved a legislative magic wand and transformed thousands of lawful permanent residents into deportable "aggravated felons" when, the day before, they had been lawfully residing in the United States and not subject to removal. Five months later on September 30, 1996, IIRIRA cast the net even wider. These new "felons," who in reality may have been guilty only of a misdemeanor committed decades before and who may have never served a day in prison, nonetheless became fair game to be rounded up by ICE "police," held without bail[316] and removed from their adopted country, with immigration judges' hands tied, disallowing their intervention. Constitutional violations were ignored: Article One's prohibition on ex post facto laws did not prevent removal for old crimes which, when committed, did not trigger deportability.[317] If ICE violated the Fourth Amendment in the search, seizure, or apprehension of these persons, the exclusionary rule would not apply.[318] The Sixth Amendment protection against double jeopardy did not protect these people from being deported for crimes with sentences long-ago served and debts to society satisfied,[319] nor would it prevent the government from arbitrarily moving their hearing thousands of miles away from their homes, families, attorneys and witnesses crucial to their cases.[320] In court, the Fifth Amend-

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315. Demore v. Kim, 538 U.S. 510, 521 (2003) (Rehnquist, C.J., writing for the majority quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)).

316. The topic of mandatory detention is discussed at greater length *supra* note 114.

317. This topic is discussed at greater length in Part V of this Comment. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment."); Mahler v. Eby, 264 U.S. 32, 39 (1924) ("The inhibition against the passage of an ex post facto law by Congress in section 9 of article 1 of the Constitution applies only to criminal laws." (quoting Calder v. Bull, 3 U.S. 386)).

318. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039–40 (1984).

319. The Double Jeopardy Clause of the Constitution provides that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend. V; "[Constitutional double jeopardy prohibition] protection applies both to successive punishments and to successive prosecutions for the same offense." United States v. Dixon, 509 U.S. 688, 696 (1993).

320. The Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." U.S. CONST., amend. VI. This right, however, does not apply to

non-citizen aliens facing deportation, who are frequently transferred to detention facilities far away from their homes, attorneys, and resources they need to adequately defend against removal. HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 1 (Dec. 2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209web.pdf [hereinafter HUMAN RIGHTS WATCH, LOCKED UP].

> Immigrant detainees can be transferred away from their attorneys at any point in their immigration proceedings, and often are. Finally, transferred criminal inmates can usually be located through a state or federal prisoner locator system, which is accessible to the public and in many cases is updated every 24 hours. There is no similar publicly accessible immigrant detainee locator system, meaning that detainees can be literally "lost" from their attorneys and family members for days or even weeks after being transferred.

Id. at 3. In addition to creating practical obstacles to fighting a removal case, transfer can affect one's legal rights because the applicable law is not the circuit from which the alien was removed, nor in the criminal context, the circuit in which his crime was committed, but instead the circuit in which the hearing ultimately takes place. *See* Memorandum from Hon. Michael Creppy, Chief Immigration Judge, to all Immigration Court Officials (Aug. 18, 2004) (available at http://www.justice.gov/eoir/efoia/ocij/oppm04/04-06.pdf) ("[T]he circuit law that is to be applied to proceedings conducted via telephone or video conference is the law governing the hearing location (i.e., the location where the case is docketed for hearing)."). Human Rights Watch reports:

> Although transfers occur into, out of, and within almost every state in the country, the three states most likely to receive transfers are Texas, California, and Louisiana. The numbers are so high in each of Louisiana and Texas that the federal Court of Appeals for the Fifth Circuit (which covers Louisiana, Mississippi, and Texas) is the jurisdiction that receives the most transferred detainees. Transfers to states covered by the Fifth Circuit are of particular interest to an assessment of the impact of immigration transfers because the circuit court is widely known for decisions that are hostile to the rights of non-citizens and because the states within its jurisdiction collectively have the lowest ratio of immigration attorneys to immigration detainees in the country. . . .
>
> [A] detainee whose deportation hearing might have been about to be heard in another jurisdiction may well find out, after transfer to a facility within the Fifth Circuit, that his or her chances of successfully fighting deportation have just evaporated.

HUMAN RIGHTS WATCH, LOCKED UP, *supra* at 6. Although a respondent may request a change of venue, this decision is a matter of discretion for the immigration judge. *See In re* Rahman, 20 I&N Dec. 480, 483 (B.I.A. 1992) ("relevant factors include administrative convenience, expeditious treatment of the case, location of witnesses, and cost of transporting witnesses or evidence to a new location"). On January 4, 2012, ICE released a new policy to restrict the transfer of detainees, requiring that:

> Unless a transfer is deemed necessary by a FOD [Field Office Director] or his or her designee under paragraph (3) of this section, ICE Supervisory Immigration Officer(s) will not transfer a detainee when there is documentation to support the following: a) Immediate family within the AOR [geographic area of responsibility]; b) An attorney of record (Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative on file) within the AOR; c) Pending or on-going removal proceedings, where notification of such proceedings has been given, within the AOR; or d) Been granted bond or has been scheduled for a bond hearing."

ment did not prevent the court from compelling their testimony, nor from silence being interpreted as evidence of guilt.[321] There would be no right to an attorney provided at government expense,[322] no right to a trial by jury,[323] and the prosecutor would not be required to prove guilt beyond a reasonable doubt.[324] The government would be able to introduce "secret evidence" the accused would not be allowed to see.[325] The Constitution, in many ways, simply ceased to apply. In large part, this was allowed to happen because of a refusal to admit the obvious—that deportation resulting from criminal conduct is a form of punishment for that criminal conduct.

1. Crime, Non-Citizen Aliens, and the Constitution

The prohibition against ex post facto laws, guaranteed in the Constitution, has been found inapplicable to immigration law at least as early as 1924. In that year, the Supreme Court in *Mahler v. Eby*[326] held that where immigration reforms in 1920 suddenly rendered a man deportable for a 1914 conviction, the constitutional protections against ex post facto laws offered no relief, finding "[t]he inhibition against the passage of an ex post facto law by Congress in [S]ection 9 of [A]rticle 1 of the Constitution applies only to criminal laws and not to a deportation act like this."[327] This was taken a step further in 1952 when the Supreme Court

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IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., POLICY 11022.1: DETAINEE TRANSFERS, JAN. 4, 2012, at 2–3 (2012), *available at* http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.

321. *See e.g.,* 8 C.F.R. § 287.3(c) (not requiring that an arresting officer warn a non-citizen alien of his right to remain silent upon his arrest for an immigration violation); *In re* Laqui, 13 I&N Dec. 232, 234 (B.I.A. 1969) ("We can see nothing inherently unfair in requiring a person suspected of being an alien to testify as to the true facts, even though his own testimony may lead to his deportation."); *In re* R.S., 7 I&N Dec. 271, 271 (B.I.A. 1956) (holding that "respondent's refusal to testify concerning questions of alienage, time, place, and manner of entry, and possession of entry documents, constitutes evidence supporting a finding that he is deportable as charged").

322. INA § 276, 8 U.S.C. § 1362 (2006).

323. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

324. Woodby v. INS, 385 U.S. 276, 277 (1966).

325. Although a respondent generally has the right to examine evidence presented against him by the government, a "national security" exception may be invoked to prevent him from examining the government's evidence. INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2006). Additionally, because compliance with the Federal Rules of Evidence is not required in immigration proceedings, hearsay is admissible evidence. *See In re* Lam, 14 I&N Dec. 168, 172 (B.I.A. 1972) (holding that for due process concerns, "adherence to judicial rules of evidence" is not required "unless deviation would make the proceeding manifestly unfair").

326. 264 U.S. 32 (1924).

327. Mahler v. Eby, 264 U.S. 32, 39 (1924).

in *Harisiades v. Shaugnessy*[328] found that no ex post facto protection existed to halt deportation based on *conduct* which, when committed, constituted neither a crime nor a ground of deportability.[329] In the opinion issued by the Court Justice Jackson wrote:

> It always has been considered that that which [the ex post facto provision of the Constitution] forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.[330]

He went on to quote Justice Holmes from a 1913 opinion, *Bugajewitz v. Adams*:[331]

> The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident.[332]

The assertion in *Bugajewitz* that conduct deemed criminal under state and local laws also gives rise to deportation is merely "coincidence" and "an accident" is almost as absurd as the suggestion that deportation following criminal conduct does not constitute a form of punishment for that crime, although the Court has upheld exactly that view for well over one hundred years. In 1893, the Court in *Fong Yue Ting*[333] downplayed the significance of deportation, writing:

> The order of deportation is not a punishment for crime. It is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return [of an alien] to his own country. . . . [The alien] has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the [C]onstitution, securing the right of trial by jury, and prohibiting un-

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328. 342 U.S. 580 (1952).

329. Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952).

330. *Id.* at 594.

331. 228 U.S. 585 (1913).

332. Bugajewitz v. Adams, 228 U.S. 585, 592 (1913). The *Bugajewitz* Court referenced back to an even earlier finding, in *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893) in which the Court established that "'[d]eportation' is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated." *Id.*

333. 149 U.S. 698, 730 (1893).

> reasonable searches and seizures and cruel and unusual punishments, have no application.[334]

Despite the Court's assertion in *Fong Yue Ting* that there was no deprivation of liberty at issue when a non-citizen is deported and that no due process of law is required, subsequent case law has disagreed. Ten years after *Fong Yue Ting*, the Court in *Yamataya v. Fisher*[335] recognized that a liberty interest did exist where a non-citizen alien faced deportation and due process required, at a minimum, that the alien must be given an opportunity to be heard prior to his removal.[336]

Aliens outside the United States applying for admission have been found to have no constitutional rights to due process whatsoever,[337] however, the Fifth Amendment of the Constitution is applicable to "all persons" in the United States,[338] and thus due process of law bears on the cases of all non-citizen aliens present within the country, legally or not. Later cases have decided that exactly what due process demands is based on the immigration status the non-citizen alien enjoys. The Court in 1950 wrote:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he

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334. *Fong Yue Ting*, 149 U.S. at 730. Ironically, Justice Black, writing a concurrence in *Lehman v. United States ex rel. Carlson*, found deportation to be "banishment." Wrote Justice Black in calling for the application of the ex post facto clause to immigration laws:

> What is being done to these respondents seems to me to be the precise evil the ex post facto clause was designed to prevent. Both respondents are ordered deported for offenses they committed long ago-one in 1925 and the other in 1936. Long before the 1952 Act reached back to add deportation as one of the legal consequences of their offenses both paid the price society then exacted for their misconduct. They have lived in the United States for almost 40 years. To banish them from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later. I think that this Court should reconsider the application of the ex post facto clause with a view to applying it in a way that more effectively protects individuals from new or additional burdens, penalties, or punishments retrospectively imposed by Congress.

Lehmann v. United States *ex rel.* Carson, 353 U.S. 685, 691 (1957) (Black, J., concurring).

335. 189 U.S. 86 (1903).

336. Kaoru Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

337. Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").

338. "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. CONST., amend. V. *But see* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1255 (N.D. Utah 2003) (holding that a previously-removed felon was not a "person" in the context of the Fourth Amendment and thus could not assert that his Fourth Amendment rights had been violated).

> increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing.[339]

That the Court would make an about-face from its assertion in *Fong Yue Ting* that deportation demands no due process was encouraging, and is not the only area in which rights of non-citizen aliens may be expanded to better comport with our Constitution and its protections.

Unlike in criminal hearings, indigent non-citizen aliens, including lawful permanent residents, are not required to be appointed counsel in removal proceedings,[340] however, the statute does not say that in fact they *cannot* be appointed representation. In fact, at least one Circuit Court has recognized:

> The Supreme Court's holdings in [other civil cases] have undermined the position that counsel must be provided to indigents only in criminal proceedings . . . . Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, "fundamental fairness" would be violated.[341]

Calling for appointment of counsel for all indigent respondents in removal cases, dissenting District Judge DeMascio declared, "[a] resident alien's right to due process should not be tempered by a classification of

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339. Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950).

340. INA § 292, 8 U.S.C. § 1362 allows respondents appearing in removal proceedings to be represented by counsel, but "at no expense to the Government." INA § 292, 8 U.S.C. § 1362 (2006). This has given rise to claims of violation of due process, especially when applied to vulnerable groups including children and the mentally handicapped. On Dec. 19, 2011, District Judge Dolly Gee unsealed a ruling which certified as a class hundreds of immigrants with mental disabilities who allege that denying them appointed counsel violated due process, the INA and other federal laws. *See* Order Re: Plaintiffs' Motion For Class Certification, Franco-Gonzalez, v. Napolitano, No. CV 10-02211 DMG (DTBx) (9th Cir. Dec. 19, 2011), *available at* http://nwirp.org/documents/pressreleases/UnsealedOrderGrantingClassCertificationFrancov.Napolitano12-20-2011.pdf. Among the named plaintiffs is Ever Francisco Martinez-Rivas, a lawful permanent resident facing deportation for an assault crime against his step-father. *See* Franco-Gonzales v. Holder, 767 F.Supp.2d 1034, 1041 (2010). Martinez-Rivas suffers from schizophrenia, resulting in auditory hallucinations and "the inability to speak more than a few words at a time." *Id.* Trial in this case was set to begin Feb. 28, 2012.

341. Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975).

the deportation proceeding as 'civil,' 'criminal,' or 'administrative.' No matter the classification, deportation is punishment, pure and simple."[342]

But of course, the dissenting opinion of a Judge on the Sixth Circuit Court of Appeals is not binding on the Supreme Court and though overruled to the extent that deportation gives rise to no issues of deprivation of liberty and due process, *Fong Yue Ting* continued to expound the opinion of the Court that "deportation is not a punishment."[343]

2. *Padilla v. Kentucky*: Hope for the Future?

2010's *Padilla v. Kentucky* may have finally changed *Fong Yue Ting's* long-standing view. Jose Padilla, a citizen of Honduras, had been a lawful permanent resident for more than forty years[344] and had served honorably in the U.S. Army during the Vietnam War before he was convicted of trafficking marijuana under a Kentucky statute in 2002.[345] After his criminal defense attorney incorrectly assured him that "he had been in this country for so long" that a guilty plea would not result in his deportation, Padilla then pleaded guilty to a charge deemed an "aggravated felony" under the expanded definition which, in the words of the Court, "made him subject to automatic deportation," a penalty the Court noted "is now virtually inevitable for a vast number of non[-]citizens convicted of crimes."[346] After he was placed in removal proceedings, Padilla sought a post-conviction vacatur of his plea, arguing that were it not for the ineffective assistance of his criminal defense attorney, he never would have pleaded guilty to a charge that could have subjected him to "mandatory deportation" as an "aggravated felon."[347] The Supreme Court of Kentucky denied vacatur on Sixth Amendment ineffective assistance of counsel grounds, finding that Padilla's pending deportation was merely a "collateral consequence" of his conviction.[348]

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342. *Id.* at 572 (DeMascio, J., dissenting). Dissenting from the opinion of the majority that the result of the case would have been the same had the respondent been appointed counsel, District Judge DeMascio wrote, "I think a resident alien has an unqualified right to the appointment of counsel . . . Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow an *In re Gault* finding of delinquency." *Id.*

343. Fong Yue Ting v. U.S., 149 U.S. 698, 730 (1893).

344. Padilla v. Kentucky, 559 U.S. __, 130 S.Ct. 1473, 1477 (2010).

345. Brief for Petitioner at 2, *Padilla*, 559 U.S. __, 130 S.Ct. 1473 (2009) (No. 08-651), 2009 WL 1497552 at *2.

346. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1478.

347. Brief for Petitioner, *supra* note 345, at 3.

348. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1478. Previously, all jurisdictions had held that the Sixth Amendment right to effective counsel, guaranteed under *Strickland v. Washington*, 466 U.S. 668 (1984), did not include advice by an attorney of the *collateral,* as opposed to direct consequences of a criminal conviction. For a discussion of this issue, *see*

The Supreme Court disagreed, refusing to recognize a difference between "direct" and "collateral" consequences of a criminal plea and ultimately holding that non-citizen aliens have a constitutional right under the Sixth Amendment to advice from their criminal defense attorneys regarding the potential immigration consequences of a plea of guilty; where a defense attorney fails to affirmatively advise his alien client, should this failure result in the alien being prejudiced, a vacatur under the Sixth Amendment is warranted.[349]

Perhaps even more important than the expansion of Sixth Amendment rights to non-citizen aliens, was Justice Steven's declaration that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the *penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes."[350]

Justice Stevens noted that, as per *Fong Yue Ting*, deportation "is not, in a strict sense, a criminal sanction," but

> [D]eportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of non[-]citizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.[351]

By refusing to differentiate between direct and collateral consequences of criminal convictions, the Court directly contradicts the ridiculous assertion in *Bugajewitz* that deportation for certain conduct and criminal sanctions for the same conduct is a mere "coincidence," instead making

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Gabriel Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and Consequences of Guilty Pleas,* 87 CORNELL L. REV. 697 (2001).

349. *Padilla*, 559 U.S. at __, 130 S. Ct. at 1486–87. Whether this right will be applied retroactively remains to be seen. Two circuits have thus far rejected a retroactive application of *Padilla*: the Seventh Circuit (Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011)) and Tenth Circuit (United States v. Chang Hong, No. 10-6294, 2011 WL 3805763. at *8 (10th Cir Aug. 30, 2011 revised Sept. 1, 2011)). The Third Circuit has affirmed retroactive application of *Padilla* (United States v. Orocio, 645 F.3d 630, 641 (3rd Cir. 2011). On April 30, 2012, the Supreme Court granted certiorari in *Chaidez* to resolve this split among the circuits. Chaidez v. United States, No. 11-820, 2012 WL 1468539 (Apr. 30, 2012) *available at* http://www.supremecourt.gov/orders/courtorders/043012zor.pdf.

350. *Padilla*, 559 U.S. __, 130 S. Ct. at 1481 (emphasis added).

351. *Id.* (citations omitted). Justice Stevens also commented on the current lack of discretion available to trial judges to recommend against deportation, and to immigration judges to halt deportation in deserving cases. *Id.* at __, 130 S. Ct. 1478 .

the common-sense observation that the two have been "enmeshed" for as long as the Court previously asserted they weren't, and noting that deportation is "uniquely difficult to classify" as either a civil (collateral) or criminal (direct) consequence.[352] *Padilla* even suggests that the possibility of deportation should be brought into the plea-bargaining process and discussed between the defense and prosecution, further blurring the line between criminal sanctions and a civil "penalty" for the same conduct.[353]

3. If it Doesn't Walk Like a Civil Proceeding, Doesn't Swim Like a Civil Proceeding, and Doesn't Quack Like a Civil Proceeding . . . [354]

Deportation and removal proceedings seemed to bear stronger resemblance to criminal punishment and prosecution than civil proceedings in other ways, even before the *Padilla* Court admitted difficulty in classifying deportation as civil. Non-citizen aliens in removal proceedings are detained, often in state or local jails, alongside the regular incarcerated population.[355] This detention frequently comes after being arrested by heavily-armed ICE agents, wearing jackets labeling them as "POLICE,"[356] sometimes in tactical pre-dawn raids at the homes of suspects.[357] And at the actual hearing, the respondent is opposed by a government prosecutor.[358] Going beyond the physical similarities, the

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352. *Id.* at __, 130 S. Ct. at 1482.

353. *Id.* at __, 130 S. Ct. at 1486.

354. Scardino v. Am. Int'l Ins. Co., No. 07-282, 2007 WL 3243753, at *1 n.1 (E.D. Pa. Nov. 2, 2007) ("As the late poet James Whitcomb Riley famously said, 'When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.' This case is the embodiment of the obvious . . . .").

355. Raja Abdulrahim, *Federal Immigration Detainees to be Housed at Two Orange County Jails,* L.A. TIMES, July 21, 2010, http://articles.latimes.com/print/2010/jul/21/local/la-me-0721-federal-beds-20100721 (reporting that immigration detainees would be housed at local jails.) Lawful permanent resident respondents facing deportation are often mandatorily detained without the possibility of posting bond; this topic is discussed at greater length *supra* note 114.

356. Karina Rusk, *SJ Officials Want 'Police' Removed From ICE Jackets,* ABC7NEWS.COM (San Francisco) (Oct. 4, 2007), http://abclocal.go.com/kgo/story?section=news/local&id=5691288.

357. *See* CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 1 (2009), *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf (reporting a dramatic increase in the use of home-raids to detain non-citizen aliens); Chris Hedges, *Condemned Again for Old Crimes; Deportation Law Descends Sternly, and Often by Surprise,* N.Y. TIMES, Aug. 30, 2000, http://www.nytimes.com/2000/08/30/nyregion/condemned-again-for-old-crimes-deportation-law-descends-sternly-often-surprise.html?pagewanted=all&src=pm (reporting that Luis Friere was arrested at 5:30 AM at his home in front of his wife and two young children).

358. Marks, *supra* note 254.

actions of the courts also seem to reveal acceptance that removal hearings are more than civil proceedings. As discussed previously, Supreme Court jurisprudence has gone from the denial of any liberty interest at stake in deportation in *Fong Yue Ting* to a recognition of a "generous and ascending scale of rights as [a non-citizen alien] increases his identity with our society," culminating in an "enlarged . . . right against Executive deportation except upon full and fair hearing" for lawful permanent residents.[359] Despite a general agreement that there is no right to an attorney at government expense in removal proceedings,[360] the BIA has also recognized that when a respondent is represented by counsel, and that counsel is ineffective to a degree that it interferes with the non-citizen alien "reasonably presenting his case," his Fifth Amendment due process rights are violated and remedial action may be warranted.[361] Using similar logic, the Supreme Court held the exclusionary rule inapplicable to exclude from removal hearings evidence obtained in "peaceful arrests by INS officers" that violated the Fourth Amendment, but noted that the exclusionary rule might apply to evidence obtained through "egregious violations of Fourth Amendment or other liberties."[362] Since that time, availability of suppression motions for evidence obtained in such "egregious violations" of the Constitution have been recognized, although infrequently granted, by all eleven Circuit Courts and the BIA.[363]

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359. Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950).

360. *But see* Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975).

361. *In re* Lozada, 19 I&N Dec. 637, 638 (B.I.A. 1988). Most Circuits have also granted petition for review based on ineffective assistance of counsel. *E.g.,* Aris v. Mukasey, 517 F.3d 595, 601 (2d Cir. 2008); Fadiga v. Att'y Gen., 488 F.3d 142, 163 (3d Cir. 2007); Sanchez v. Keisler, 505 F.3d 641, 650 (7th Cir. 2007); Mai v. Gonzales, 473 F.3d 162, 167 (5th Cir. 2006); Osei v. INS, 305 F.3d 1205, 1209–10 (10th Cir. 2002); Saakian v. INS, 252 F.3d 21, 26–27 (1st Cir. 2001); Castillo-Perez v. INS, 212 F.3d 518, 528 (9th Cir. 2000); *In re* N.K & V.S., 21 I&N Dec. 879, 881–82 (B.I.A. 1997) (granting a motion to reopen based on claim of ineffective assistance); *In re* Grijalva-Barrera, 21 I&N Dec. 472, 472 (B.I.A. 1996) (finding that ineffective assistance of counsel may constitute to exceptional circumstances necessary to for a motion to reopen an *en absentia* removal order).

362. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984).

363. *E.g.,* Navarro-Chalan v. Ashcroft, 359 F.3d 19, 22–23 (B.I.A. 2004) (recognizing that a suppression motion would be available in the case of an "egregious violation" of the Fourth Amendment, but finding the facts in the instant case did not reach that level); United States v. Farias-Gonzalez, 556 F.3d 1181, 1189–90 (11th Cir. 2009) (finding that an illegal search could give rise to suppression of evidence, but not identity evidence as in the instant case); United States v. Oscar-Torres, 507 F.3d 224, 232 (4th Cir. 2007) (remanding the issue to a lower court to determine whether the evidence was obtained, even only in part, with an "investigative purpose," and ordering its suppression if the lower court so found); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2nd Cir. 2006) ("[E]xclusion of evidence is appropriate under the rule of *Lopez-Mendoza* if record evidence established either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation-regardless of its egregiousness or unfairness-undermined the reliability of

Times have changed since Justice O'Connor declared in 1984 that constitutional violations were acceptable as long as they were "peaceful" and that deportation was a "purely civil action."[364] In the ensuing twenty-five years, the grounds of deportability stemming from criminal activity have increased enormously. Her comments predate the 1988 creation of the "aggravated felony" ground of deportability, the 1990 removal of trial-judge discretion to halt removal, and the two 1996 laws—AEDPA and IIRIRA—that dramatically broadened the list of crimes for which a non-citizen alien may be removed, stripped immigration judges of power to halt mandatory deportations, subjected long-term lawful permanent residents to indefinite mandatory detentions, and reached back in time to render deportable thousands of people for minor crimes committed decades ago. After discussing the troubling evolution of immigration law in regards to crime-based grounds of deportability, the *Padilla* Court concluded that "[t]hese changes to our immigration law have dramatically raised the stakes of a non[-]citizen's criminal conviction."[365] The inane claim of the *Bugajewitz* Court, calling it "coincidence" that criminal conduct also gives rise to deportation is but an "accident" has never been less true.

So where does *Padilla* leave us now? As difficult as it was to deny the punitive nature of deportation resulting from criminal conduct before *Padilla*, it now seems virtually impossible. Ever since *Calder v. Bull*,[366] laws that create or increase criminal sanctions for conduct committed before

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the evidence in dispute."); United States v. Bowley, 435 F.3d 426, 430–31 (3rd Cir. 2006) (recognizing the ability to suppress illegally obtained evidence, including identity evidence, but refusing to apply this principle in the instant case); United States v. Olivares-Rangel, 458 F.3d 1104, 1121 (10th Cir. 2006) (finding that some evidence obtained during an illegal search must be suppressed in the context of a prosecution for illegal re-entry); Miguel v. INS, 359 F.3d 408, 412 (6th Cir. 2004) (recognizing that a suppression motion may be appropriate in removal proceedings in some instances, but finding that it was not necessary in the instant case as the immigration judge did not rely on the evidence in forming the basis of the motion to suppress); Martinez Camargo v. INS, 282 F.3d 487, 492 (7th Cir. 2002) (recognizing the availability of suppression motions in the immigration context); United States v. Guevara-Martinez, 262 F.3d 751, 752 (8th Cir. 2001) (suppressing illegally obtained fingerprint evidence in the context of a prosecution for illegal re-entry); Velasquez-Tabir v. INS, 127 F.3d 456, 461 (5th Cir. 1997) (refusing to suppress evidence obtained in violation of the National Labor Relations Act (NLRA)); Orhorhaghe v. INS, 38 F.3d 488, 491, 493 (9th Cir. 1994) (finding that where Legacy INS agents illegally searched a man's home solely because he had a "Nigerian-sounding name" the *Lopez-Mendoza* standard requiring "egregious violations" of the Fourth Amendment was met and evidence obtained which established his deportability was thus properly suppressed); *In re* Benitez, 19 I&N Dec. 173, 181 (B.I.A. 1984).

364. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

365. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1480 (2010).

366. 3 U.S. 386 (1798).

the law existed have been found to violate Article 1, Section 9 of the Constitution, which prohibits ex post facto laws.[367] Ex post facto laws are forbidden as being violations of due process by depriving persons of life, liberty or property without notice.[368] As previously discussed, the Court has recognized a liberty interest at stake in deportations, especially in the case of lawful permanent residents. The retroactively applicable laws of 1996 made thousands of lawful permanent residents subject to deportation for conduct committed prior to the passage of this legislation. If the Court has finally recognized that deportations, which would not have occurred "but for" the criminal conduct, are in fact part of the total punishment for the crime itself, it seems that retroactively applicable statutes like IIRIRA can no longer hide from the prohibition on ex post facto laws and must instead be seen as unconstitutional.

B. *Ending Retroactivity and Statutes of Limitation for Removal*

Even if the Court continues to avoid taking the final step to overrule *Fong Yue Ting* and find that deportation is punishment and thus constitutional protections must apply,[369] there are strong policy reasons[370] to stop the retroactive application of immigration laws and apply some form of statute of limitations to deportation based upon crimes known to the government.

IIRIRA created new grounds for deportability based on old conduct, thereby creating deportability for persons who were previously not removable, but many other persons removed from the United States in recent years had in fact been deportable well before 1996. As immigration laws have evolved over the past century to create more and more grounds

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367. Calder v. Bull, 3 U.S. 386, 391 (1798).

368. Principles prohibiting ex post facto laws have been incorporated into the Fifth and Fourteenth Amendments. *See generally*, Bouie v. City of Columbia, 378 U.S. 347 (1964); Evans v. Ray, 390 F.3d 1247, 1250–51 (10th Cir. 2004).

369. The ruling in *Fong Yue Ting* was not unanimous; in fact three Justices dissented, among them was Justice Brewer who wrote:

> Deportation is punishment. It involves first an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property. . . .
>
> It needs no citation of authorities to support the proposition that deportation is punishment . . . .
>
> But punishment implies a trial: "No person shall be deprived of life, liberty, or property, without due process of law."

Fong Yue Ting v. United States, 149 U.S. 698, 740–41 (1893).

370. For a discussion of policy reasons for repealing 28 C.F.R. § 0.197, which would allow prosecutors and law enforcement to prevent the deportation of lawful permanent residents in exchange for assistance in the investigation of crimes in which they may have had a minor role, see Rachel Frankel, Note, *Sharks and Minnows: Using Temporary Alien Deportation Immunity to Catch the Big Fish,* 77 GEO. WASH. INT'L L. REV. 431 (2009).

for deportability based on criminal actions, many lawful permanent residents have triggered some form of removability, but were not targeted for removal for long periods of time. Years, sometimes decades later, these lawful permanent residents, often middle-aged or elderly, are suddenly taken into custody as DHS agents struggle to find sufficient "criminal aliens" to meet ever-increasing quotas. In *Lopez-Mendoza*,[371] Justice O'Connor declared that "[t]he purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."[372] If this is indeed true, creating new grounds of deportability for old crimes and enforcing removal based on old crimes hardly seems to make sense.

1. Creating Criminals and Ending Retroactivity

> The law is sweeping, even overreaching. We have told Congress that changes need to be made and some discretion needs to be returned to our immigration judges. But as the law stands now, the ability of the immigration judges to look at all aspects of the individual's life, including the crime committed, whether they are members of the P.T.A., what their jobs are or if they have a family, is no longer possible. If they are picked up, most are deported. And we are deporting people who at the time of their conviction did not commit a deportable offense, but under the new law can be removed.
>
> Bill Strassberger, Legacy INS spokesman[373]

Among the reasons that discretion on the part of the trial judges and immigration judges is so critical is that an enormous number of persons stand to be affected by immigration laws which prescribe deportation as a consequence for criminal conduct. As previously discussed, non-citizen aliens comprise nearly thirteen percent of the total population of the United States. U.S. Census Data and U.S. Department of Justice figures estimate that more than one out of every four adults residing in the United States has some form of serious misdemeanor or felony record.[374] While immigrants are far less likely to commit crimes than their U.S.-

371. 468 U.S. 1032 (1984).

372. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

373. Hedges, *supra* note 357.

374. *See* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (Mar. 2011), *available at* http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf (identifying various statistics concerning criminal records in the United States).

born counterparts,[375] this still leaves a large number of non-citizen aliens vulnerable to deportation on criminal-conduct based grounds.

On September 28, 2011, ICE announced that in a weeklong round-up effort named "Cross Check," 2,901 "criminal aliens" had been apprehended.[376] ICE boasted on their website that of those arrested, 1,600 had felony convictions.[377] Left unsaid was that the remaining 1,301 apparently *did not* have felony convictions, but were nonetheless arrested and placed in removal proceedings. More troubling, of those apprehended, only 1,067 had been previously removed or even ordered removed, meaning the remaining 1,834 apprehended aliens had been convicted of a crime of which the government was aware, served their sentence, been released into the United States and were then targeted for removal later. If these non-citizen aliens posed such a danger to the people of the United States, why were they released to live among us? The likely answer is that they neither posed a danger then, nor posed a danger when "Cross-Check" rounded them up. It is likely that a large percentage of these individuals committed crimes that, at the time of commission, were so minor that they did not trigger deportability—but later became "aggravated felonies" under the expanded definition created by AEDPA and IIRIRA in 1996.

U.S. Representative Lamar Smith, (R-Tex.) a frequent champion of anti-immigrant legislation, and a supporter of both 1996 laws, told Congress:

> Americans should not have to tolerate the presence of those who abuse both our immigration and criminal laws. S. 735 [which eventually became part of AEDPA] ensures that the forgotten Americans—the citizens who obey the law, pay their taxes, and seek to raise their children in safety—will be protected from the criminals and terrorists who want to prey on them.[378]

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375. *See* Duncan Martell et al., *Study Finds Immigrants Commit Less California Crime,* REUTERS, Feb. 26, 2008, http://www.reuters.com/assets/print?aid=USN246261520080226 (discussing a report discussing that, in California, immigrants are less likely to commit a crime).

376. Charlie Savage, *2,901 Arrested in Crackdown on Criminal Immigrants,* N.Y. TIMES, Sept. 28, 2011, http://www.nytimes.com/2011/09/29/us/crackdown-on-criminal-immigrants-operation-cross-check-brings-2901-arrests.html?_r=1&pagewanted=print.

377. Press release, U.S. Immigration and Customs Enforcement, ICE Arrests More Than 2,900 Convicted Criminal Aliens, Fugitives in Enforcement Operation Throughout All Fifty States, Eighteen Weapons Seized During Operation (Sept. 28, 2011) (available at http://www.ice.gov/news/releases/1109/110928washingtondc.htm).

378. 142 CONG. REC. 7972 (1996) (statement of Rep. Lamar Smith, R-Tex.). Smith, who crusaded for IIRIRA a few months after AEDPA, defended the laws in an editorial in early 1998, writing that a critic of the law "cites shoplifting as a crime for which an alien may be deported under the 1996 immigration reform law—a view peddled in the media by

That lofty assertion hardly seems to explain what the legislation went on to do. Many Americans, instead of being protected from predatory "criminals and terrorists," lost family members and bread-winners. Johanna Hasson lost her husband of thirty-four years, Jose Velasquez. Velasquez, the son of a U.S. citizen mother and a foreign diplomat became a lawful permanent resident in 1960.[379] In 1965, Velasquez married his wife and they later had three children.[380] He led what the court later called an "exemplary life."[381] But in 1998, he was arrested and placed in deportation proceedings as an "aggravated felon" for a 1980 offense in which, after a friend asked if he sold cocaine, Velasquez said no, but suggested that another person might.[382] Although there was never any suggestion that he intended to benefit financially, Velasquez pleaded guilty to a charge of conspiracy to sell a controlled substance and was sentenced to five years' probation.[383] Eighteen years after his offense, Velasquez was retroactively an "aggravated felon," and his removal became mandatory.[384] Johanna Hasson's tragedy isn't unusual. A 2007 report shows that from 1991 to 2006, 300,000 non-citizen aliens have been removed as "aggravated felons."[385] Data also shows that on average, these non-citizen aliens had lived in the United States for fourteen years before they were charged as "aggravated felons"[386]—the data does not reflect when the crimes triggering their removals occurred.[387]

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immigration lawyers. But it's false." Lamar Smith, Editorial, *Immigration Facts,* WASH. POST, Feb. 16, 1998, at A26. Maria Wigent probably wishes that Smith were right—she was deported to Italy in 1999 as an "aggravated felon" based on multiple convictions for shoplifting eye-drops and deodorant. Wigent left behind her husband, parents, and two sons. Eric Lipton, *As More Are Deported, a '96 Law Faces Scrutiny,* N.Y. TIMES, Dec. 21, 1999, http://www.nytimes.com/1999/12/21/nyregion/as-more-are-deported-a-96-law-faces-scrutiny.html?pagewanted=print&src=pm. Since that time, many more lawful permanent residents have been deported for shoplifting and similar offenses. "I really don't think there was anyone in Congress who anticipated what would happen," David S. Martin, then general counsel for Legacy INS told Human Rights Watch ten years later, ". . . they just didn't want to appear soft on immigration[.]" *See* HUMAN RIGHTS WATCH, FORCED APART *supra* note 79*,* at 31–32.

379. Velasquez v. Reno, 37 F. Supp. 2d 663, 664 (B.I.A. 1999).

380. *Id.*

381. *Id.* at 665.

382. *Id.*

383. *Id.* at 664.

384. *See Velasquez*, 37 F. Supp. 2d at 672 (awarding the respondent habeas corpus relief from mandatory detention, but not relief from removal as an "aggravated felon").

385. TRAC IMMIGRATION: *NEW DATA*, *supra* note 253.

386. *How Often is the Aggravated Felony Statute Used?*, TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/158/.

387. Especially troubling is that the data shows that by 2006, more than half of persons removed as "aggravated felons" were removed by ICE agents through administrative orders and therefore *never even appeared* before an immigration judge to determine if the

ground of deportability was correctly applied in their case. TRAC IMMIGRATION: *New Data*, *supra* note 253. This practice, known as expedited removal, which is not correctly applied to lawful permanent residents, allows non-citizen aliens to be removed administratively as "aggravated felons" based on the determination of a non-judge, non-lawyer, ICE agent with no opportunity for review of that determination. INA § 238(a)(3), 8 U.S.C. § 1228(a)(3). Because a great deal of analysis can be involved in the determination that an alien is an "aggravated felon," it is not unlikely that it could be inaccurately applied. This judicial evaluation of the applicability of the "aggravated felony" ground of deportability is crucially important. Once removed, it is extremely difficult to have the underlying ground of deportability evaluated by an immigration judge as INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) allows previously executed removal orders to be reinstated without further review by an immigration judge. This is because IIRIRA also further limited judicial review by establishing the practice of reinstating an executed removal order where an alien previously removed returned illegally to the United States. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 305(a), 110 Stat. 3009-546 (amending 8 U.S.C. § 1231(a)(5)) The amended, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) reads:

> (5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2006). This practice means that an alien previously removed who is found in the United States will be removed again without an opportunity to appear before an immigration judge to apply for discretionary relief or adjust status. Although this provision took effect on April 1, 1997, the Supreme Court upheld reinstatement of a removal order for an alien who was deported and subsequently returned *before* April 1, 1997, but failed to take affirmative steps to legalize his status until *after* the effective date, effectively applying the provision retroactively. Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006). Ironically, reinstatement, does not apply in the cases of aliens who were ordered removed, but failed to leave the United States, as the statute includes the language "after having been removed." INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). In contrast to an expedited removal in which the applicability of the "aggravated felony" ground of deportability is made by an ICE agent and is not subject to review, a determination made by an immigration judge may be appealed to the BIA, the circuit court and, potentially, to the Supreme Court. This appellate review is crucially important—since the birth and expansion of the "aggravated felony" definition, many cases have resulted in the determination that in fact, it was incorrectly applied. Carachuri-Rosendo v. Holder, 560 U.S. __, 130 S. Ct. 2577, 2586 (2010); Sareang Ye v. INS., 214 F.3d 1128, 1134 (9th Cir. 2000); Nina Bernstein, *For Those Deported, Court Rulings Come Too Late*, N.Y. TIMES, July 20, 2010, http://www.nytimes.com/2010/07/21/nyregion/21deport.html?pagewanted=print. It is important to note, however, that post-IIRIRA, an alien may be deported while his case is on appeal to the Circuit Court or Supreme Court unless a stay of that removal is granted. INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) (2006). ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.") *See also* Nken v. Holder, 556 U.S. 418, 435 (2009) (discussing that the law after IIRIRA's repeal of INA § 1105a now allows for appeals of immigration petitions to continue, even after the alien's deportation). Interest-

By expanding the criminal grounds on which lawful permanent resident aliens can be deported, and then applying the new definition retroactively, such legislation essentially creates new criminals. Responding to Representative Smith's remarks in favor of passing AEDPA, U.S. Representative Patsy Mink (D-Haw.) cautioned:

> I regret that this legislation is being used to advance . . . . anti-immigrant attitudes . . . . However, it is wrong to place upon legal immigrants a higher penalty for crimes which in themselves are not related to terroristic activities . . . . The only way out for now is to encourage aliens to become U.S. citizens and avoid this jeopardy.[388]

Unfortunately, a lawful permanent resident that has committed an "aggravated felony" any time after November 29, 1990 is permanently ineligible to naturalize, and many are discovered in the process of application.[389] Concerned by increasing anti-immigrant sentiment,

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ingly, the Court in *Nken* based their decision in part upon the government's assurances that, "[a]liens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." *Id.* at 435. The Court based their belief that a program existed for the return of deported aliens who later win their cases on a brief produced by counsel for the government, which assured "[b]y policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States by parole under 8 U.S.C. § 1182(d)(5) if necessary, and according them the status they had at the time of removal." Brief for Respondent at 44, *Nken*, 556 U.S. 418, (No. 08-681), 2009 WL 45980 at *44. After widespread criticism from immigration attorneys who insisted in fact no such "program" existed and a court order to turn over information regarding this program (Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., __ F. Supp. 2d __ (S.D.N.Y. 2012)), the Solicitor General wrote to the Supreme Court to concede that no such program existed in writing and that "the government is not confident that the process for returning removed aliens, either at the time its [the government'] brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied. The government therefore believes that it is appropriate both to correct its prior statement to this Court and to take steps going forward to ensure that aliens who prevail on judicial review are able to timely return to the United States." Letter from Deputy Solicitor General, Michael R. Dreeben, to Hon. William K. Suter, Clerk, the Supreme Court of the United States (Apr. 24, 2012), at 4, *available at* http://dl.dropbox.com/u/27924754/nken-v-holder-letter.pdf.

388. 142 CONG. REC. 7972 (1996) (statement of Rep. Patsy Mink, D-Haw.).

389. As discussed *infra* Part III, to naturalize and become a U.S. citizen, an alien must be able to demonstrate that he is, and has been, a person of good moral character for a certain statutorily defined period of time, generally 3 or 5 years. INA §§ 316(a),(e), 8 U.S.C. §§ 1427(a), (e) (2006). Aliens who have committed an "aggravated felony" are statutorily unable to ever be found to have "good moral character," regardless of when the conviction occurred. INA § 101(f)(8); 8 U.S.C. § 1101(f)(8). Thus, an alien convicted of an "aggravated felony" after Nov. 29, 1980 is not able to naturalize and become a United States citizen. Military service does not alter this. Adjudicators of naturalization applica-

Refugio Rubio-Arias decided to naturalize after thirty-three years as a lawful permanent resident. When he walked into his naturalization interview, he was arrested, detained and placed in deportation proceedings for a 1972 conviction for possession of marijuana with intent to distribute.[390] That he had long-since served his sentence, that he had seven U.S. citizen children and a wife, that he had an otherwise spotless criminal record were all irrelevant; immigration judges no longer had the authority to review his mandatory deportation.[391]

As retroactive application of the expanded grounds of deportability creates new deportable criminal aliens, the inability to naturalize and thus escape the risk of deportation, effectively traps these people in a "limbo" status forever. Mike Burrows has been a lawful permanent resident since 1962, but is fighting (and losing) a nine-year battle to avoid deportation as an "aggravated felon" for a 1978 conviction in which he received stolen property—a used 8-track player.[392] Although the misdemeanor conviction was later expunged, Burrows had it re-opened and vacated in an effort to avoid removal, but to no avail. On his blog Burrows writes: "This is how I live my every day, wondering when ICE is going to kick the door in and drop me off at the nearest detention center (again)."[393]

It is hard to understand how such removals make Americans safer. It seems unlikely that Representative Smith's "forgotten Americans" were

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tions are specifically instructed to watch for applicants who have committed "aggravated felonies." Guidance on the topic appearing in the CIS Adjudicator's Field Manual reads,

> For naturalization purposes, an applicant convicted of an aggravated felony on or after November 29, 1990, regardless of when the crime was committed, is permanently precluded from establishing good moral character. Accordingly, an application for naturalization filed by an individual convicted of an aggravated felony on or after November 29, 1990, must be denied. Moreover, the case should be considered for possible initiation of removal proceedings because an individual convicted of an aggravated felony at anytime is removable.

Adjudicator's Field Manual, *supra* note 263.

390. Patrick J. McDonnell, *Criminal Past Comes Back to Haunt Some Immigrants, Law: Legal Residents Now Face Deportation for Crimes in U.S., No Matter How Old,* L.A. TIMES, Jan. 20, 1997, http://articles.latimes.com/print/1997-01-20/news/mn-20414_1_criminal-past.

391. S.L. Bachman, *Criminal Pasts Haunt Immigrants: New Law Requires Deportation For Old Convictions,* THE SEATTLE TIMES, June 15, 1996, http://community.seattletimes.nwsource.com/archive/?date=19960615&slug=2334594.

392. Elise Foley, *Deportation Looms For 50-Year Legal Resident*, HUFFINGTON POST(Dec. 20, 2010), http://www.huffingtonpost.com/2010/12/20/deportation-looming-for-5_n_799434.html?view=print&comm_ref=false; *Immigration Hysteria Gone Crazy_ Deporting A Resident of 50 Years*, NEWS JUNKIE, (Dec. 5, 2010), http://newsjunkiepost.com/2010/12/05/immigration-hysteria-gone-crazy-deporting-a-resident-of-50-years/.

393. Mike Burrows, *How I Came to be an Enemy of the State,* POSTERBOY FOR IMMIGR. PERSECUTION (Feb. 19, 2010 at 4:10 pm), http://proburrows.blogspot.com/2010/02/how-i-came-to-be-enemy-of-state_19.html.

in much danger of being "preyed on" by Velasquez, Rubio-Arias, or Burrows. Far more likely, their removal actually destabilizes their families and communities. Speaking in support of H.R. 668, which would eventually be incorporated into AEDPA, Representative Smith insisted that the expansion of deportable offenses included as "aggravated felonies" and the elimination of immigration judges' discretion to review deportations was necessary to "'counter the escalation of crime robbing Americans of the freedom to walk their streets, the right to feel secure in their homes, and the ability to feel confident that their children are safe in their schools.'"[394] Rather than make her feel safe in her home, the retroactivity and lack of judicial review of the 1996 laws cost Cristina Cerami hers. Her husband, Antonio, was deported in 2003 for a 1984 attempted robbery conviction for which he was not deportable until the retroactive 1996 laws reached nineteen years into the past.[395] Suddenly an "aggravated felon," Cerami was removed to Italy after thirty years as a lawful permanent resident, leaving behind his wife of eleven years and their children.[396] After his deportation, Cerami's family fell apart. Distraught, their youngest son sought counseling, but eventually took comfort in drugs. Without Cerami's income, his wife lost their home, forcing her children to split up and move in with friends and relatives.[397]

Deportation brings with it tremendous financial strain and tremendous social costs, which extend well beyond the non-citizen alien himself. Data shows that more than 1 million people have lost an immediate relative to deportation since 1997,[398] one expert states that 1,100 families are separated per day.[399] A 2010 study suggests that in the same time period, deportation of lawful permanent residents resulted in at least 100,000 children losing a parent and an additional 217,000 other persons losing an immediate family member, including a spouse.[400] Removal of lawful permanent residents in this period also cost the government an estimated $255 million.[401] Figures published by the U.S. Department of Justice in

394. H. Richard Friman, *Migration and Security: Crime, Terror, and the Politics of Order*, *in* IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 136 (Ariane Chebel d'Appollonia & Simon Reich eds., 2008).

395. HUMAN RIGHTS WATCH, FORCED APART, *supra* note 79 at 3–4.

396. *Id.* The couple has one child together and Antonio is an involved step-father to Cristina's four other children.

397. *Id.*

398. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS), *supra* note 54, at 43.

399. Meribah Knight, *Deportation's Brief Adios and Prolonged Anguish,* N.Y. TIMES, May 8, 2010, http://www.nytimes.com/2010/05/09/us/09cncbroadview.html?scp=1&sq=deportation's+brief+adios&st=cse&pagewanted=print.

400. INT'L HUMAN RIGHTS LAW CLINIC, supra note 288.

401. *Id.* at 5.

2011 estimated that to secure a final removal order costs the government, on average, $20,338 in legal expenses.[402] This number rises to $25,553 when detention and physical removal costs are added.[403] Aside from direct costs to taxpayers, a 2010 Urban Institute study found that once a non-citizen family member was placed in removal proceedings, his family commonly experienced a dramatic loss of household income effecting housing and the ability to provide sufficient food.[404] In addition to economic impacts, the removal of parents caused their children to experience significant emotional problems. Not surprisingly, more than half of those children studied had changed eating and sleeping habits and developed behavioral problems.[405]

In cases involving deportation of lawful permanent residents, removals on criminal grounds constitute the overwhelming majority.[406] Retroactively applied legislation only increases the number of lawful permanent residents who may fall victim to deportation—and increases the number of U.S. citizen family members who may be collaterally affected by their removal. In a sense, retroactive legislation that creates newly removable aliens also creates the "problem" of more criminal aliens the government must then spend resources to deport—as well as creating an enormous "problem" for families caught in the middle. It is somewhat improbable that families who lose lawful permanent resident members on retroactively-created criminal grounds will become *less* likely to become dependent on government assistance, potentially creating yet another issue for the government to address. And whether or not the estimated $255 million spent thus far on removing lawful permanent residents is an accurate figure, such an endeavor is doubtless a costly operation, coming at a time when stability in the community and governmental thrift have become more important than ever. Perhaps most critically, creating "new criminals" does nothing to further any goal of safety in our communities. Nor does it address Justice O'Connor's goal of ending long-standing immigration violations—in fact retroactive laws do exactly the opposite and *create* violations and violators.

Our immigration laws provide ample grounds on which to remove those among us—including lawful permanent residents—who commit contemporary crimes, even minor offenses. Retroactive application of criminal grounds of deportability is thus not necessary to achieve any sort

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402. U.S. DEPT. OF JUSTICE, 15 IMMIGR. LITIG. BULL. 6 (July 2011).

403. *Id.* at 7.

404. AJAY CHAUDRY ET AL., URBAN INST., FACING OUR FUTURE CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT ix (Feb. 2010), *available at* http://www.urban.org/publications/412020.html.

405. *Id.*

406. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 23.

of reasonable goal, but rather destabilizes families in a historically unstable time. Far from a solution, retroactive application of the 1996 laws and the "aggravated felons" they produce are a problem of our own creation.[407]

2. Statute of Limitations on Deportation of Legal Residents for Known Criminal Offenses

> There are possibilities of shocking cruelty, as the cases show, in a deportation statute having no period of limitation. There are the same humanitarian reasons for limitation of the right to deport as there are for limitation on prosecutions for crime.
>
> Justice Morton, *Costanzo v. Tillinghast* (1932)[408]

American immigration laws have failed to include common-sense statutes of limitation on deportation for a long time. Famous civil-rights activist Will Maslow wrote that immigration reforms lacking a statute of limitations on deportations "depict[ ] us as cruel and vindictive. . .and oblivious of the standards of decency and fair play that mark our criminal legislation."[409] His comments appeared in 1956, and referred to the Immigration and Nationality Act of June 27, 1952, also known as the McCarran Act.[410] Even so, the reforms of 1952 were not the first time Congress passed laws creating deportability without a time limit and current laws continue to exist in such a form that deportations routinely occur many years after the crime that triggers them.

In 1974, Jesus Collado-Munoz was nineteen, living in New York, and had a fourteen-year-old girlfriend. Upset that the two were having consensual sex, the girlfriend's mother called police and both were sent to court.[411] Collado-Munoz pleaded guilty to a misdemeanor charge of statutory rape and was placed on probation for one year.[412] His family and the family of his teenage girlfriend reconciled and stayed friends. Collado-Munoz eventually married, had three children, started a restaurant

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407. It bears asking if legislation that essentially creates new removable "criminal aliens" isn't fueled, in part, by the enormous quotas placed on ICE and DHS. By creating new criminal aliens to deport, legislators help DHS reach what might otherwise be an increasingly difficult goal. Quotas set for removals of non-citizen aliens are discussed at greater length in Part IV of this Comment.

408. Costanzo v. Tillinghast, 56 F.2d 566, 568 (1st Cir. 1932) (Morton, J., concurring).

409. Will Maslow, *Recasting Our Deportation Law: Proposals for Reform,* 56 COLUM. L. REV. 309, 309 (1956).

410. Immigration and Nationality Act of 1952 (McCarran Act), ch. 477, 66 Stat. 163.

411. *No Justice*, supra note 304.

412. Vincent J. Schodolski, *Immigrants Face Deportation For Old Crimes Under New Laws: Reform Snares Legal Residents,* CHICAGO TRIB., Oct. 12, 1997, http://articles.chicagotribune.com/1997-10-12/news/9710120412_1_immigration-law-mandatory-detention-ins.

and never had another run-in with the law. In 1997, however, he was taken into custody, mandatorily detained, and placed in removal proceedings—twenty-two years after his misdemeanor conviction.[413] During his detention, both his wife and daughter were hospitalized. Collado-Munoz eventually survived the government's attempts to remove him when it was determined that, despite the government's claims that his crime qualified at a CIMT, it in fact did not. Collado-Munoz's release however, did not come until he had nearly lost his restaurant and accumulated $79,000 in debt as a result of his months of detention and lengthy legal battle.[414] His attorney explained later that Collado-Munoz was only spared because the law had been found not to apply in his case, and not for any reason associated with hardship to him or his family, or the length of time that had passed since he served probation for this misdemeanor offense.[415] In fact, the BIA has specifically found that a lawful permanent resident may be arrested and mandatorily detained at any time after his release from custody, regardless of the amount of time that passed between his release and the subsequent detention, provided that "criminal custody" existed at some point in time.[416]

It seems difficult to understand the point of deporting long-time lawful permanent residents for crimes committed decades ago. Aside from those swept up in legislation that retroactively created deportability, many lawful permanent residents committed crimes that caused them to be deportable at the time of the offense—yet were left alone to serve their sentences and live in peace for years. These crimes were committed and prosecuted, and their sentences served in the United States, placing DHS on at least constructive notice of the convictions. If these persons truly posed a danger to the community, why were they ignored for years or even decades? And why initiate expensive removal proceedings against these lawful permanent residents now?

The severity of offenses triggering removal years later varies widely. Farhan Ezad was arrested for trying to sell $15 worth of drugs in his dorm room at Rutgers University in 1995, where he was working toward a double major. The judge who gave him probation told Ezad the offense could result in deportation—but that the judge had decided not to deport

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413. Ojito, *supra* note 304

414. *Id.*

415. *Id.* In addition to discovering an INS mistake which allowed the court to halt his removal, Mr. Collado-Munoz also appears to have benefitted from a private bill passed on his behalf. *See* A bill for the Relief of Jesus M. Collado-Munoz, H. R. 2831, 105th Cong. (Nov. 5, 1997).

416. *See In re* Rojas, 23 I&N Dec. 117, 124 (B.I.A. 2001).

him.[417] In reality, after the abolishment of JRAD, the trial judge had no such authority, and DHS initiated removal proceedings against Ezad fifteen years later in the summer of 2010.[418] Luis Freire committed a more serious offense, participating in a fatal stabbing in 1975 and serving fifteen years in prison.[419] When he was released, he turned his life around. He became a "model employee," working as a carpenter.[420] But ten years after Freire had been released from prison, DHS arrested him in a pre-dawn raid on his home in front of his wife and two young children.[421]

Clearly, selling drugs and murder cannot be condoned. But neither can allowing lawful permanent residents to serve sentences for their crimes and rebuild their lives—for years—under the belief, mistaken or not, that they would be able to continue to live in the society to which they paid their debt. Statutes of limitation exist for prosecuting all but the most serious crimes.[422] Writing for the majority in a case for recovery of civil damages, Justice Marshall explained that "[t]he statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim."[423] Statutes of limitation exist for prosecuting almost all crimes that trigger deportation; time limits even exist for prosecuting criminal immigration offenses such as illegal re-entry.[424] Why then is

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417. Derek Beres, *Homeland Security's Inhumane Deportations Continue*, HUFFINGTON POST (Feb. 3, 2011), http://www.huffingtonpost.com/derek-beres/homeland-securitys-inhuma_b_818244.html.

418. *Id.*

419. Hedges, *supra* note 357

420. *Id.*

421. *Id.*

422. In Texas, only extremely serious crimes have no statute of limitations on prosecution. These include murder, manslaughter, crimes involving sexual assault of a child, and leaving the scene of an accident that resulted in the death of a person. TEXAS CODE OF CRIM. PROC., Art. 12.01.

423. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980)

424. Reentry of removed aliens is a felony under 8 U.S.C. § 1326. 18 U.S.C. § 3282(a), which governs prosecutions brought under Section 1326, states "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." The five-year statute of limitations is tolled, among other reasons, until the alien is discovered in the United States following removal. United States v. Are, 498 F.3d 460, 464 (7th Cir. 2007). In the first half of 2011, prosecutions under § 1326 constituted twenty-three percent of total federal prosecutions, more than any other charge. *See Illegal Reentry Becomes Top Criminal Charge*, TRAC IMMIGRATION (June 10, 2011), http://trac.syr.edu/immigration/reports/251/. Criminal prosecutions for illegal entry and crimes often associated with undocumented immigrants are often subject to mandatory criminal sentences. Sentencing 57 workers arrested in a raid on a meat-packing plant, Judge Mark Bennett said, "I found the plea agreement that the immigrants were asked to sign profes-

similar logic not applied when resurrecting old, known convictions to serve as the basis of deportation years later?

The need for a statute of limitations is not new, indicated by the fact that Maslow wrote his article on the issue in 1956. Also not new are reasonable suggestions about appropriate limits. On January 1, 1953, the President's Commission on Immigration and Naturalization presented findings to President Truman in his final weeks in office.[425] Among the suggestions made by the Commission was that no deportation of a lawful permanent resident commence more than ten years after a deportable offense had occurred. Noting that prosecution of even serious criminal offenses was restrained by statutes of limitation, the Commission wrote:

> No one has suggested any sound reason why the purpose of limitations—recognition of the unfairness involved in requiring a person to make a defense long after the event, when it is difficult or impossible to assemble witnesses and evidence—does not apply to immigration matters at least with equal force as to prosecutions for serious crimes.[426]

More than fifty years later, such a "sound reason" still has yet to emerge. The Commission in 1953 found that while deportable aliens should be removed, ten years provided "ample" time for the Government to discover the violation and commence removal proceedings.[427] The Commission included all grounds of deportability in their discussion of time limits on removability, including illegal entry, which is harder to discover than a known conviction for an offense that occurred in the United States. Where the deportation is triggered by a conviction for a crime which occurred in the United States, and which was not concealed from

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sionally and personally to be offensive. I thought it was a travesty. I was embarrassed to be a United States district judge that day." *Immigrant Deal 'Embarrassed' Judge*, OMAHA WORLD HERALD, Feb. 7, 2011, http://www.omaha.com/article/20110207/NEWS97/110209787/0. The article reports that Judge Bennett later told documentary filmmakers:

> [t]o have [fifty-seven] people in a row that don't even have a single misdemeanor among them is unheard of in federal court. So if anybody deserved mercy and compassion and fairness and justice, these [fifty-seven] did. And I don't believe they received it, even though I was the one who imposed sentence, because my hands were tied by the Department of Justice in the case.

Id.

425. *See generally* REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME (Jan. 1953) [hereinafter PRESIDENT'S COMMISSION].

426. *Id*. at 198.

427. *Id*.

discovery, the Commission's recommendation of a ten-year statute of limitations makes even more sense.[428]

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428. Underscoring the need for a statute of limitations in which to commence removal proceedings is the unavailability, in any practical sense, of equitable estoppel claims, which are essentially foreclosed by a provision which states "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." INA § 242(g), 8 U.S.C. § 1252(g) (2006). Even without this limitation, equitable estoppel arguments have never been particularly successful in the immigration context, in no small part due to the fact that, although the Supreme Court has stopped short of finding a ruling of equitable estoppel against the government impossible, neither has it upheld such a claim. Chien-Shih Wang v. Att'y Gen., 823 F.2d 1273, 1276 (8th Cir. 1987). In a 1991 case, *In re* Hernandez-Puente, 20 I&N Dec. 335 (B.I.A. 1991) the court wrote:

> The Board of Immigration Appeals and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Immigration and Naturalization Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation.

In re Hernandez-Puente, 20 I&N Dec. at 335. The Supreme Court refused to apply equitable estoppel against the government for failing to advise a would-be applicant for naturalization of time limits in which he must apply. INS v. Hibi, 414 U.S. 5, 8 (1973). It has also declined to apply equitable estoppel for erroneously refusing to issue a passport to a pregnant U.S. citizen, causing her baby to be born abroad and thus not obtain birthright citizenship. Montana v. Kennedy, 366 U.S. 308, 314 (1961). Citing those cases, the Court in *INS v. Miranda* also failed to apply equitable estoppel when the INS delayed processing a marriage-based application to adjust status for eighteen-months, during which time the marriage on which the petition was based, dissolved. INS v. Miranda, 459 U.S. 14, 18 (1982). While the Court noted that "neither the Government's conduct nor the harm to the respondent is sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country[,]" it did allow that "[t]his case does not require us to reach the question [of] whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws. [However] proof only that the Government failed to process promptly an application falls far short of establishing such conduct." *Miranda*, 459 U.S. at 18–19. In order for a claim of equitable estoppel against the government to lie, the plaintiff must satisfy four elements, in addition to proving "affirmative misconduct." First, the party to be estopped, here, the government, must have been aware of the true facts of the case—that a lawful permanent resident had committed a crime giving rise to deportability. *See* Edgewater Hosp., Inc. v. Bowen, 857 F.2d 1123, 1138 (7th Cir. 1988) (listing the elements of the equitable estoppel defense). Second, the government must have either intended that its conduct—failure to take action against a deportable lawful permanent resident for a lengthy period of time—would be interpreted by the lawful permanent resident as the government's agreement not to pursue deportation on these grounds, or it must have been reasonable for the lawful permanent resident to have had that belief. *Id.* Third, the lawful permanent resident must have been truly unaware that the delay by the government was not intended as a waiver of his deportation based upon that criminal offense. *Id.* Fourth, the lawful permanent resident must have reasonably relied on the government's failure to initiate deportation proceedings to his substantial detriment. *Id.* Lastly, the government's conduct—here, inaction for many years against a deportable lawful permanent resident—must rise to the level of "affirmative misconduct." *See* Mendoza-Hernandez v. INS, 664 F.2d 635, 639 (7th Cir. 1981). In

the context of a lawful permanent resident who commits a crime in the United States which triggers deportability, it seems a sound argument that the government would have, at a minimum, constructive notice of the offense as well as its significance in terms of giving rise to removability. That the long-term inaction on the part of the government in commencing removal proceedings against deportable lawful permanent residents was intentioned to cause the belief that such action would never be taken may not be the case, however, it may also be possible to make a case that such a belief on the part of the long-ignored deportable criminal alien was reasonable. Many lawful permanent residents facing deportation many years after committing a triggering offense had renewed their permanent resident alien cards ("Green Cards") in the interim. Bob Kalinowski, *Past Mistake Leads to Possible Deportation,* CITIZEN's VOICE (Luzerne County, Pa.), Jan. 30, 2011, http://citizensvoice.com/news/past-mistake-leads-to-possible-deportation-1.1097443#axzz1amTnMr00. Many lawful permanent residents have traveled out of the country, presented themselves for inspection upon return, and were allowed to pass without incident. It is likely that the majority were truly unaware that, despite the delay, the government did not intend to waive their deportation on an old criminal ground. Even an attentive observer could be easily confused by the intent of years of government inaction, considering a history of mixed messages by Congress, Legacy INS and later ICE encouraging prosecutorial discretion—interspersed with DHS programs such as the forebodingly named "Endgame," which states its goal as "the removal of all removable aliens." U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012 (Aug. 2003), *available at* http://cryptogon.com/docs/endgame.pdf [hereinafter ENDGAME]. Although the argument could be made that a lawful permanent resident deported years after his offense had actually benefitted by the government's inaction, the opposite argument could also be made. Since most criminal offenses triggering deportation must be committed by adults, or minors charged as adults, the years between the commission of a crime and delayed-deportation are often those in which unsuspecting lawful permanent residents start families and careers, buy homes and plan for their futures. Deported in middle age or nearing retirement, the likelihood is increased that they leave behind lives, savings and families that never would have been created, at least not in the United States, but for the government's inaction. Although circuit-level case law has found that delays of many years in adjudicating an affirmative petition for an immigration benefit did not constitute "affirmative misconduct," a delay of acting to *revoke* a benefit may present a stronger case in terms of equitable estoppel. When the government delays in adjudicating a petition, the applicant knows that eventually, adjudication will come and can prepare for the various possibilities accordingly. But, where a lawful permanent resident has received the benefit of residency, government failure to decide whether to revoke that residency in a reasonable time period causes a much greater degree of reliance upon the government's inaction as indicating that removal will not be initiated. It seems reasonable that in some cases this inaction could rise to the level of affirmative misconduct. This, however, may also be the element most difficult to prove. Although *Miranda* left a window cracked for equitable estoppel claims in immigration cases, subsequent case law has not been encouraging. Eight- and nine-year delays in processing applications for asylum were found not to constitute "affirmative misconduct." Ventosa v. Ashcroft, 92 Fed. App'x. 859, 862 (3rd Cir. 2004); Kowalczyk v. INS, 245 F.3d 1143, 1149 (10th Cir. 2001). The Seventh Circuit held that "government's failure to discharge an "affirmative obligation" is not the same as engaging in "affirmative misconduct." Gibson v. West, 201 F.3d 990, 994 (7th Cir. 2000). Even so, the Second Circuit found that where a consulate failed to advise an immigrant visa applicant, as required, that marriage would invalidate her visa, the government was equitably estopped from ordering

VI. SOLUTIONS

> It is not the business of the courts to tell Congress what to do about public policy choices, but we are entitled to warn when the machinery that we help administer is breaking down. The current structure of deportation law, greatly complicated by rapid amendments and loop-hole plugging, is now something closer to a many-layered archeological dig than a rational construct. The regime is badly in need of an overhaul.
>
> Chief Judge Boudin, *Kim v. Gonzàles*, (2006)[429]

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her deportation after she married. *See* Corniel-Rodriguez v. INS, 532 F.2d 301, 304, 307 (2nd Cir. 1976). The Court reasoned that "basic notions of fairness must preclude the Government from taking advantage of the consul's dereliction, and that a contrary result would work a serious and manifest injustice." *Id.* at 302. Deportations of lawful permanent residents years after what are often minor crimes can easily be seen as a "serious and manifest injustice" for not only the deportee but his American family as well. Under current laws, where discretion by immigration judges no longer exists to prevent removal for the old, minor crimes of lawful permanent residents with established lives in the United States, the need for equitable estoppel is underscored. Mistakes in application of grounds of deportability are made—Jesus Collado-Munoz is living in the United States today because the government erred in finding that his crime constituted a CIMT. Ojito, *supra* note 304. Careful examination of records is necessary to prove these errors, but for older convictions, records and evidence may no longer exist to defend against removal—the records of Mike Burrows' 1978 misdemeanor conviction were destroyed years ago by fire. Mike Burrows, *Nine Years,* POSTERBOY FOR IMMIGR. PERSECUTION, (Oct. 18, 2008, 6:06 PM), http://proburrows.blogspot.com/2010/10/nine-years.html. Burrow's writes on his blog:

> How could I have ever imagined that a $50 eight-track tape deck would, thirty-one years later, place me on the wrong side of a DOJ tribunal and the agency charged with keeping us safe from terrorists? The conviction no longer exists. I managed to get a lower court to reopen and vacate a 30-year-old expunged misdemeanor (all the court documents were destroyed by fire years ago), but I can't get the U.S. Department of Justice to stop blocking my efforts to get this dang deportation order lifted.

Id. For crimes that did not give rise to deportability when committed, but that are then retroactively made removable offenses, a person may not have been aware that keeping copies of decade-old conviction documents was even necessary. The Court in *Miranda* found that, regarding the eighteen-month delay in processing Miranda's application, "the evidence that the Government failed to fulfill its duty in this case is at best questionable. The only indication of negligence is the length of time that the INS took to process respondent's application. Although the time was indeed long, we cannot say in the absence of evidence to the contrary that the delay was unwarranted." *Miranda*, 459 U.S. at 14. Justifying a delay of eighteen months for an individual on notice that a decision was forthcoming is clearly not the same as inaction for a decade or longer in the instance of a respondent who is unaware that he has a case at all. In the interest of "basic notions of fairness," this seems a logical conclusion for the Court to reach, notwithstanding INA § 242(g), 8 U.S.C. § 1252(g). *Id.*

429. Kim v. Gonzáles, 468 F.3d 58, 63 (1st Cir. 2006).

That immigration reform is needed is perhaps the one point on which interested parties can agree. In addition to a backlog of more than 300,000 cases pending before the nation's immigration courts,[430] immigration-related cases now form more than a third of the entire docket for some circuit courts of appeals.[431] The 1996 legislative reforms, regardless of their intentions, have created an enormous backlog of cases in courts at every level, resulted in the removal of thousands of lawful permanent residents for whom deportation was indisputably unfair and not in line with legislative intent,[432] and have been extremely costly to both the government and to our society.[433] Although contributing to the problem on a smaller scale, some appellate judicial decisions have also added to the backlog problem by limiting the ability of judges to terminate removal proceedings and clear cases from their dockets, even when removal is no longer at issue.[434]

The issues discussed in this Comment highlight some of the points that future reform should address. The points in Part IV suggest a return to policies that for decades successfully prevented exactly the problems we are faced with today. Part V suggests implementing more novel revisions, changes to immigration law that have been discussed and debated for almost as long as there have been immigration consequences of crime, but never actually enacted. Considering the size of the problem, it is likely that both approaches—a return to proven solutions and implementation of untried ideas—will be needed to overcome it.

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430. Gleason, *supra* note 20.

431. *See* G.M. Filisko, *Immigration Rx: ABA offers remedies to breathe life back into a failing system,* July 1, 2010, http://www.abajournal.com/magazine/article/immigration_rx/ (reporting that the Second and Ninth Circuits reported that as of 2010, immigration matters constituted 35-40% of the courts' dockets); Solomon Moore and Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts: As caseloads skyrocket, judges blame the work done by the Board of Immigration Appeals*, L.A. TIMES, May 2, 2005, http://articles.latimes.com/print/2005/may/02/local/me-backlog2 (reporting that in 2005, immigration matters constituted 48% of the Ninth Circuit Court of Appeals docket).

432. The stated purposes of AEDPA and IIRIRA are discussed at length *supra* Part IV.

433. Financial costs and social costs of deportation of lawful permanent residents are discussed at greater length *supra* Parts IV and V.

434. *See In re* Armida Sosa Ventura, 25 I&N Dec. 391, 396 (B.I.A. 2010) (finding that an immigration judge cannot terminate the removal proceeding against a respondent even after the respondent is granted Temporary Protected Status (TPS) by USCIS and instead requiring that removal proceedings continue, even though "any such removal order could not be executed during the period in which the respondent's TPS status is valid").

A. *Policy*

While some of the changes proposed by this Comment would require legislative approval from a deeply divided Congress, other changes can be effected now through policy changes. Policies such as the Customs and Border Patrol initiative specifically targeting the removal of lawful permanent residents with old convictions[435] cannot be justified, especially in light of the costs to a government in fiscal crisis and the destabilizing impact on such a large body of U.S. citizens. With the current state of immigration law, most lawful permanent residents ensnared in DHS dragnets will, as Justice Stevens noted in *Padilla,* face "virtually inevitable" removal from their adopted country, families, and lives in the United States.[436] Stepping back from the language of "quotas"[437] did not prevent ICE from removing an unprecedented number of non-citizen aliens in 2010, nor from planning to continue to break new records in coming years.[438] To continue policies that actively seek out lawful permanent residents with old, minor, non-violent convictions[439] and add their removal cases to an already impossibly backlogged judicial system is irresponsible. To continue to hunt lawful permanent residents for deportation to meet agent performance expectations,[440] or departmental goals,[441] at a time when immigration law has eliminated nearly all avenues of relief in even

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435. *Change in CBP Policy on Deferred Inspection of Legal Permanent Residents with Criminal Convictions*, AM. IMMIGRATION LAWYER'S ASS'N, *supra* note 222.

436. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473, 1478 (2010)

437. *See* Press release, ACLU, Controversial Memo on Immigration Detention Quotas Raises Doubts about ICE Leadership (Mar. 30, 2010), http://www.aclu.org/immigrants-rights/controversial-memo-immigration-detention-quotas-raises-doubts-about-ice-leadership, Anna Gorman, *Immigration Official Says Agents Will No Longer Have to Meet Quotas*, L.A. TIMES, Aug. 18, 2009, http://articles.latimes.com/print/2009/aug/18/local/me-immigration18.

438. Kumar Kibble, Deputy Director, U.S. Immigration And Customs Enforcement appeared before a House Committee and stated:

> Nearly 50 percent of the aliens we removed in FY 2010 had been convicted of criminal offenses. Removing these individuals helps to promote public safety in communities across the country. We expect that this trend will continue, and that this fiscal year, we will again remove a record number of criminal aliens from the country.

Hearing Before the H. Comm. on Homeland Security, Subcomm. on Border and Maritime Security, 112th Cong. 1 (2011) (Statement of Kumar Kibble, Deputy Director, U.S. Immigration And Customs Enforcement), *available at* http://www.dhs.gov/ynews/testimony/20111004-kibble-admin-amnesty-and-border-control.shtm.

439. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS), *supra* note 54, at 2 (reporting that of aliens deported from 1997 to 2007 on crime-based grounds, of those legally present, including lawful permanent residents, seventy-seven percent were deported for non-violent crimes).

440. Memorandum from Clinton A. Felsom, *supra* note 223.

441. E-mail from James M. Chaparro, *supra* note 223.

the most deserving, dire or drastic cases, is unconscionable. Simply put, until the law can be reformed to address the serious concerns of courts, advocacy groups, legislators and a frightened public, the policies that have created the current frenzy of deportations must be stopped.

B. *Restoring Old, Good Ideas*

1. JRAD

Until the reforms of 1996, the idea of discretion from deportation was well-recognized in immigration law. The 64th Congress, in creating the first criminal grounds of removal, also recognized the importance of creating discretionary relief to avoid the removal of an "unfortunate" lawful permanent resident in cases in which removal was not warranted under the circumstances and established JRAD to avoid such an unintended and undesirable outcome in such cases. Even as ADAA created the first definition of an "aggravated felony" and declared that "[a]n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States[ ]"[442] it also expanded JRAD to specifically include judicial discretion for this new ground of deportation[443]—even though at that time the ground was reserved for only three serious crimes, murder, narcotics trafficking and firearms trafficking.[444] Even after the repeal of JRAD, courts have given, and continue to give, considerable deference to determinations by judges and prosecutors that an alien defendant is not deserving of deportation,[445] likely because those persons involved in the underlying criminal prosecution best understand the degree of culpability of the alien, the severity of the offense and what other punishment the alien has been assessed. That this important discretion was afforded to judges at a time when few crimes could foreseeably trigger deportation, but is not extended today when the list of deportable

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442. INA § 238(b)(6), 8 U.S.C. § 1228(b)(6) (2006).

443. Anti-Drug Abuse Act of Nov. 18, 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4470-71.

> § 7344. GROUNDS OF DEPORTATION. (a) IN GENERAL.—Section 241(a)(4) (8 U.S.C. 1251(a)(4)) is amended—(2) by inserting after the semicolon the following: "or (B) is convicted of an aggravated felony at any time after entry;" (b) APPLICABILITY—The amendments made by subsection (a) shall apply to any alien who has been convicted, on or after the date of the enactment of this Act, of an aggravated felony.

Id.

444. *See* Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, 102 Stat. 4181.

445. *See* Solis-Chavez v. Holder, 662 F.3d 462, 463 (7th Cir. 2011) (finding that a 1989 JRAD issued outside of the 30-day post-sentencing window was nonetheless valid as the judge has manifested a clear intent to recommend against the deportation of the lawful permanent resident defendant); *In re* C.V.T., 22 I&N Dec. 7 (B.I.A. 1998) (giving substantial weight, in the context of a cancellation of removal case, to a recommendation against deportation from the district attorney who had prosecuted the respondent's criminal case).

offenses has grown exponentially, makes little sense. Recent acknowledgement that deportation is more than a mere "collateral consequence" of a crime underscores this inconsistency.[446] JRAD discretion should be restored to give the ability to recommend against removal back to those persons best able to judge a non-citizen defendant's criminal conduct. Further, it should be applied to all crimes potentially giving rise to deportability, and should not be limited to CIMTs and "aggravated felonies." Narcotics offenses, eliminated from JRAD eligibility in 1952, have consistently been the single largest category of crime triggering deportation in recent years.[447] To meaningfully diminish the backlog of cases in the immigration court system, JRAD should be applicable in all deserving cases, regardless of type.[448] Unlike reform measures which have *created* removal cases or shifted the backlog from one rung of the court system to another, JRAD would eliminate cases on the immigration court docket, effectively working to prevent backlog of removals for future crimes, in cases where deportation should not be considered.

2. Discretion for Immigration Judges

Discretion afforded to immigration judges is at an all-time low. In addition to lacking discretion to terminate removal proceedings against a respondent in extreme or unreasonable cases,[449] immigration judges also

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446. Padilla v. Kentucky, 559 U.S. __, 130 S.Ct. 1473, 1482 (2010).

447. *See* OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2009 (Aug. 2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf; IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 23.

448. This is especially true considering that executive pardons are unavailable to narcotics and domestic violence offenses. *See* INA §§ 237(a)(2)(A)(vi), 237 (a)(2)(B)-(C), 8 U.S.C. §§ 1227(a)(2)(A)(vi), 1227(a)(2)(B)–(C) (2006) (failing to allow for presidential or gubernatorial pardons). A pardon can remove deportability for CIMTs, aggravated felonies, high-speed flight and multiple criminal convictions, but not grounds of deportability and inadmissibility for crimes involving firearms, domestic violence and narcotics. *See generally In re* Yuen, 12 I&N Dec. 325 (B.I.A. 1967).

449. An immigration judge's authority to terminate a removal proceeding is limited, but does exist in certain instances. If a removal proceeding is terminated, the alien's immigration status reverts to what it was before the proceedings were commenced and the government must file a new Notice to Appear (NTA) to initiate removal proceedings against the alien again. Where an immigration judge determines that the government has failed to meet its burden and establish that the alien is, in fact, removable, termination of proceedings by the immigration judge is justified. Recently, the number of removal cases terminated by immigration judges due to the alien in fact *not* being subject to removal, has increased dramatically. Recent data obtained from ICE through FOIA requests shows that from 2006 to 2010, almost 100,000 aliens were hailed into immigration court proceedings which were ultimately terminated after it was revealed that they did not qualify for removal. *ICE Seeks to Deport the Wrong People,* TRAC IMMIGRATION (Nov. 9, 2010), http://trac.syr.edu/immigration/reports/243/. In contrast, however, administrative closure is

lack authority to terminate removal proceedings against a respondent for whom relief has already been granted by USCIS,[450] and where regulation[451] authorizes discretion to terminate proceedings against a respondent who has shown that he is prima facie eligible for naturalization, judges are *not* afforded discretion to make that determination, nor are they given authority to require any other agency to do so, effectively nullifying this narrow avenue of discretion.[452] That the immigration courts

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a procedure by which the case may be removed from the court's active docket, sometimes indefinitely, however the alien remains in removal proceedings and his case may be recalendared before the court at any time. On January 31, 2012, the BIA reversed its own precedent of fifteen years by holding that an immigration judge may administratively close a case over the objections of the government. *See In re* Avetisyan, 25 I&N Dec. 688 (B.I.A. 2012). Although potentially very beneficial for many respondents currently in removal proceedings, the BIA cautioned that it "would not be appropriate for an Immigration Judge or the Board to administratively close proceedings if the request is based on a purely speculative event or action (such as a possible change in a law or regulation); . . . or an event or action that may or may not affect the course of an alien's immigration proceedings (such as a collateral attack on a criminal conviction). We emphasize, however, that these are examples only; each situation must be evaluated under the totality of the circumstances of the particular case. *Id*. at 696. While potentially very exciting for many respondents currently in removal proceedings, it remains to be seen if such a practice finds application in many of the cases contemplated here, where no relief from removal currently exists.

450. This scenario is especially puzzling considering that the agency having granted relief, CIS, and the agency advocating for the respondent's removal in immigration court, ICE, are both within the same department, DHS. *See In re* Armida Sosa Ventura, 25 I&N Dec. 391 (B.I.A. 2010) (finding that an immigration judge cannot terminate the removal proceeding against a respondent even after the respondent is granted Temporary Protected Status (TPS) by USCIS and instead requiring that removal proceedings continue, even though "any such removal order could not be executed during the period in which the respondent's TPS status is valid").

451. 8 C.F.R. § 1239.2(f) (2006). The regulation states:

> Termination of removal proceedings by immigration judge. An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

Id.

452. *See In re* Hidalgo, 24 I&N Dec. 103 (B.I.A. 2007) ("We therefore find that neither we [the BIA] nor the Immigration Judges have authority to determine his prima facie eligibility for naturalization in order to terminate removal proceedings pursuant to 8 C.F.R. § 1239.2(f)."). This is significant because a petition for naturalization cannot be adjudicated while removal proceedings are on-going. *See* INA § 318, 8 U.S.C. § 1429 (2006) (". . . no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act[.]"). Thus, once removal proceedings have been initiated, a pending application for naturalization may not be decided upon by CIS and although an immigration judge is granted the statutory right to

have become so overwhelmed[453] is not surprising, given the enormous expansion of grounds of deportability and the incredible efforts of ICE to locate, and initiate proceedings against "all removable aliens."[454] Nor, however, is it surprising that, given the state of the law and the inability of judges to exercise discretion to avoid deportation, lawful permanent residents facing removal would choose to fight their cases to the appellate level in such volume—more than 10,000 immigration appeals reach the Circuit Court level every year.[455] With no discretionary relief available, the only options lawful permanent residents have to fend off removal are to either find creative ways to avoid the attachment of mandatory grounds of deportation in their specific cases, or to postpone the inevitable for as long as possible through appeals and delays. Neither is conducive to clearing the backlog of immigration cases before immigration courts and the circuit courts, nor is it conducive to a fair application of justice in this context. It is clear that there are cases—including, but not limited to cases involving lawful permanent resident U.S. military members and veterans, foreign adoptees and family members of U.S. citizens—where discretion is needed to prevent an unquestionably unjust deportation, exactly the type of situations that were prevented by discretionary relief before its demise in 1996.[456] "Discretionary" relief is never guaranteed, but instead allows an immigration judge to do his job, and reach a just result in the removal cases before him. By failing to afford immigration judges discretion, our current laws effectively bar EOIR from reaching its stated goal of "[e]nsur[ing] the fair and efficient admin-

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terminate proceedings where an applicant is prima facie eligible for naturalization, the immigration judge cannot make that determination, which is left solely to CIS. CIS, however, has refused to make these determinations, effectively negating the immigration judge's statutory power to terminate removal on these grounds. MARY KENNEY AND TRINA REALMUTO, AM. IMMIGR. LAW FOUND., PRACTICE ADVISORY-TERMINATING REMOVAL PROCEEDINGS TO PURSUE NATURALIZATION BEFORE USCIS: STRATEGIES FOR CHALLENGING MATTER OF ACOSTA HIDALGO (Oct. 2009), *available at* http://www.ailf.org/lac/pa/Acosta_Hidalgo_lac_pa_031808.pdf.

453. *Backlog in Immigration Cases Continues to Climb*, TRAC IMMIGRATION (Mar. 11, 2011), http://trac.syr.edu/immigration/reports/225/; *New Judge Hiring Fails to Stem Rising Immigration Case Backlog*, TRAC IMMIGRATION (June 7, 2011), http://trac.syr.edu/immigration/reports/250/.

454. "'Removing all removable aliens' is, in fact, DRO's mission." ENDGAME, *supra* note 428.

455. G.M. Filisko, *Immigration Rx: ABA offers remedies to breathe life back into a failing system,* July 1, 2010, http://www.abajournal.com/magazine/article/immigration_rx/

456. Deportation of U.S. military members and veterans, foreign adoptees and family members of U.S. citizens is discussed at greater length *supra* Part IV; the repeal of 212(c) relief from deportation and subsequent litigation to restore its application in limited circumstances is discussed at great length in Note 248 of this Comment.

istration of justice."[457] Returning discretion to immigration judges to handle removal cases of lawful permanent residents triggered by crime would help ensure both a "fair" result as well as efficiently dispose of cases in which the underlying criminal conduct is clearly not serious or recent enough to justify the stiff consequence of deportation.

C. *Implementing New, Good Ideas*

1. Applying Constitutional Protections and the Prohibition Against Ex Post Facto Laws to Immigration Legislation

For almost one hundred and twenty years, the Court has maintained that deportation is not punishment for crime,[458] but in the wake of *Padilla*, it seems that view has begun to make an over-due shift. As discussed in Part V, the last century has seen courts move farther and farther away from the *Fong Yue Ting* view that deportation is not punishment and that Constitutional protections are simply inapplicable to deportation. The courts have slowly, but consistently moved toward requiring greater Constitutional protections in the deportation context. Although Justice Stevens stopped short of using the word "punishment" and instead opted for "penalty," the *Padilla* decision could be the last stop before the Court finally recognizes that, deportation *is* punishment, at least for lawful permanent residents who, but for criminal conduct, would be free to live the rest of their lives in the United States. Taking that last step across what is no longer a bright line seems unavoidable after *Padilla.*[459] Hopefully, the Court will act swiftly to correct what can only be seen as a tragic error in judgment used to defend a racist law in 1883.[460]

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457. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, FISCAL YEARS 2008-2013: STRATEGIC PLAN at 2, *available at* http://www.justice.gov/eoir/statspub/EOIR%20Strategic%20Plan%202008-2013%20Final.pdf.

458. Fong Yue Ting v. U.S., 149 U.S. 698, 730 (1893).

459. For a contemporary and detailed discussion of deportation constituting punishment, see Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?,* 61 AM. U. L. REV. 1 (2011).

460. The decision in *Fong Yue Ting*, which found that deportation was not punishment and thus Constitutional protections were inapplicable, was brought as a challenge to the Chinese Exclusion Act. *See generally,* Chinese Exclusion Act of May 8, 1882, 22 Stat. 58; *Fong Yue Ting*, 149 U.S. at 740 (1893). In October 2011, the U.S. Senate unanimously passed a resolution officially apologizing for the Chinese Exclusion Act. The resolution's sponsor, Sen. Scott Brown, R-Mass., said the measure, "cannot undo the hurt caused by past discrimination against Chinese immigrants, but it is important that we acknowledge the wrongs that were committed many years ago[.]" *See* Richard Simon, *Senate apologizes for discrimination against Chinese immigrants,* L.A. TIMES, Oct. 7, 2011, http://latimes-

2. Fairness, Reason, and Retroactivity

In addition to authoring the *Padilla* opinion, Justice Stevens also wrote the decision in *INS v. St. Cyr*,[461] the pivotal case restoring 212(c) relief to lawful permanent residents who relied upon its availability before IIRIRA repealed this discretionary relief. While admitting that Congress had the ability to make the newly-expanded definition of "aggravated felony" apply retroactively,[462] Justice Stevens made it clear that to do so was unwise. In making his point Stevens quotes a prior decision penned by Justice Scalia:

> [This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."[463]

Lawful permanent residency is the last step before an alien can naturalize and finally become a U.S. citizen, with nearly all the rights and privileges of his native-born counterpart.[464] Where a lawful permanent resident is suddenly classified as an "aggravated felon," the possibility of achieving citizenship is lost forever.[465] Even if 212(c) relief can be used

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blogs.latimes.com/nationnow/2011/10/us-senate-apologizes-for-mistreatment-of-chinese-immigrants.html.

461. 533 U.S. 289 (2001).

462. INS v. St. Cyr, 533 U.S. 289, 316 (2001). In his opinion, Justice Steven writes that:

> Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect . . . Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

Id. at 316.

463. *Id.* at 316 (2001) (quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 885 (1990) (Scalia, J., concurring)) (internal citations removed).

464. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEPARTMENT OF HOMELAND SECURITY, A GUIDE TO NATURALIZATION 18 (Apr. 2011), *available at* http://www.uscis.gov/files/article/M-476.pdf (listing requirements for naturalization, including specified time in lawful permanent resident status, with some exceptions for naturalization through military service).

465. To naturalize and become a U.S. citizen, an alien must be able to demonstrate that he is, and has been, a person of good moral character for a certain statutorily defined period of time, generally 3 or 5 years. INA § 316(a), 8 U.S.C. § 1427(a) (2006). Aliens

in his case to avoid deportation, waiver of a ground of deportability waives only the ground and nothing more—it does not waive existence of the crime itself. Thus, for those "aggravated felon" lawful permanent residents fortunate enough to escape removal through a discretionary grant of 212(c), their status as not-quite-full members of society will continue forever. They will remain subject to deportation and the whims of immigration law. Those "aggravated felons" who are unable to avail themselves of 212(c) relief, or those deemed removable on other criminal grounds for which relief is unavailable, will be deportable until they are eventually discovered and removed. Until then, they will live in limbo, as will their families. As discussed previously in greater length in Part V, the cost to the nation has been and will continue to be, enormous. When Congress eventually considers reform, definitions and consequences that apply retroactively should be abandoned; fairness and the stability of the community demand nothing less.

3. "[T]hat word—I Do Not Think it Means What You Think it Means"[466]

In addition to the above, legislators should consider the wisdom of creating and expanding the class of non-citizen aliens it considers too dangerous to continue to live among us, if not for reasons of decency, then for reasons of cost. It seems clear that shoplifting toiletries[467] and jumping subway turnstiles[468] are simply not offenses deserving of deportation and exile from one's adopted home, nor should they merit categorization

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convicted of an "aggravated felony" are statutorily unable to ever be found to have "good moral character," regardless of when the conviction occurred. INA § 329, 8 U.S.C. § 1440. Thus, an alien convicted of an "aggravated felony" is not able to naturalize and become a U.S. citizen.

466. THE PRINCESS BRIDE (20th Century Fox 1987).

467. *See* Eric Lipton, *As More Are Deported, a '96 Law Faces Scrutiny,* N.Y. TIMES, Dec. 21, 1999, http://www.nytimes.com/1999/12/21/nyregion/as-more-are-deported-a-96-law-faces-scrutiny.html?pagewanted=print&src=pm (reporting on lawful permanent resident Maria Wigent, deported as an "aggravated felon" for shoplifting eye-drops and deodorant).

468. Johnson v. Holder, 413 Fed. Appx. 435 (3rd Cir. 2010). In the decision the court writes:

> Johnson, a Jamaican citizen and legal resident of the United States for 25 years, was charged as deportable for violating New York Penal Law § 165.15, prohibiting theft of services — in his case, failure to pay a subway fare or, colloquially, "turnstile jumping." The government characterized these offenses as "crimes involving moral turpitude" ("CIMT"), subjecting the alien to deportation under [INA § 237 (a)(2)(A)(ii)] 8 U.S.C. § 1227(a)(2)(A)(ii). The alien was arrested and has been detained since 2007. . . The alien here has been incarcerated for three years for a petty offense . . . As we have indicated, there exists a substantial doubt whether the basis for detention, commission of CIMT, is valid here. Moreover, the alien is neither violent nor threat-

as "aggravated felonies" and "crimes involving moral turpitude," nor render someone a "criminal alien" for life.[469] Using frightening, made-up terms to describe such minor conduct does little more than cloud the issues, and makes genuine, meaningful debate about these matters even more difficult to achieve. It is well documented that the 1996 reforms were fueled by an anti-terrorism hysteria following the Oklahoma City bombing, an event having nothing to do with immigrants or immigration.[470] Future debate should not give in to such irrational scapegoating.[471]

4. Statutes of Limitation on Deportation for Known Criminal Offenses

In 1953, The President's Commission on Immigration and Naturalization wrote:

> That it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law is a principle deeply rooted in the ancient traditions of our legal system. The law requires that criminal prosecutions, except for capital offenses, such as murder and treason, be brought within a fixed period of time or not at all. A similar dispensation governs the enforcement of civil liabilities.[472]

The Commissioners, who clearly had no trouble recognizing that deportation is a punishment, further observed such removal was "cruel and

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ening and the crime is petty, carrying a statutory penalty of imprisonment "up to 1 year." The need for individual assessment for continued detention here is apparent. *Id.* (emphasis added).

469. ICE considers an alien with any criminal conviction a "criminal alien" regardless of the severity of criminal conviction, or the section of law under which the alien was removed. TRAC IMMIGRATION, *supra* note 217 (reporting that "the term also includes those found guilty of minor violations of the law such as traffic offenses and disorderly conduct. Immigration violations such as illegal entry into the United States, which the law defines as a petty offense, are included as well.").

470. *See* Note, Ella Dlin, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigrant Sentiments?,* 38 CATH. LAW 49 (1998) (discussing the events giving rise to the passage of AEDPA, which included the bombing of the Murrah Building in Oklahoma City by native-born U.S. citizens).

471. *See* Note, Dulce Foster, *Judge, Jury and Executioner: INS Summary Exclusion Power Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,* 82 MINN. L. REV. 209, 210 (1997). Blaming immigrants for terrorist acts for which they were not responsible has gone beyond the Oklahoma City bombing. Then-Presidential candidate Fred Thompson told attendees at an awards banquets that "[t]welve-million illegal immigrants later, we are now living in a nation that is beset by people who are suicidal maniacs and want to kill countless innocent men, women and children around the world." *See Actor: 'Suicidal maniacs' fill U.S.*, TAMPA BAY TIMES, May 26, 2007, http://www.sptimes.com/2007/05/26/news_pf/Worldandnation/Actor___Suicidal_mani.shtml.

472. PRESIDENT'S COMMISSION ON IMMIGRATION. *supra* note 425, at 197.

inhuman punishment for offenses long since forgiven" and "threatens the security of many aliens and their families. Their immunities have been removed, and they may be torn out of their accustomed places in the communities in which they live, no matter how exemplary their conduct over a long period of years."[473]

It is difficult to frame the issue more clearly. A failure to impose a reasonable statute of limitations on deportation of lawful permanent residents for known criminal convictions subjects these persons and their families to instability, without expiration or relief. The longer the period of time that elapses after a lawful permanent resident's criminal offense, the less his removal serves any benefit and the more destructive it becomes to the alien, his family, his employer and the community as a whole. Reform must address this issue, and implement a reasonable statute of limitations for deportation.

That reform of our entire immigration system is needed is not news to anyone, and the issues discussed here are but a small fraction of what is becoming an increasingly overwhelming problem. The millions of undocumented persons in our communities must be addressed, businesses must be afforded opportunities to hire needed workers without fear of costly sanctions and deportation will likely always exist as a necessary measure to remove those persons who truly pose a danger to our American society. Even so, deportation of lawful permanent residents should be meted out only in extreme circumstances, where the removal of the specific person at issue serves a purpose that outweighs the harm it will cause to the alien, his family and his community. When triggered by crime, those actually involved in the prosecution should play a role in deciding whether deportation is warranted and the immigration judge handling the case must be given the power to consider relevant factors and basic principles of fairness, not just hand out a mandatory, one-size-fits-all sentence of removal. The Court should finally recognize deportation for what it is—punishment—and afford constitutional protections accordingly. And legislators should resist feeding a hypocritical, anti-immigrant paranoia that has bedeviled and shamed our country for more than a century, using made-up terms to depict minor crimes as serious offenses and deliberately framing non-citizens as terrorists. Laws must be reformed to reflect reality and decency, and to actually achieve public safety rather than resurrect long-past convictions or change the rules to create new criminals whose removal serves nothing more than helping to reach governmental quotas. Until our immigration laws can be reformed, we the public must demand that the ridiculous policies spawned by the legislature come to a halt.

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473. *Id*. at 198.

By accepting an alien for lawful permanent residence, we have extended him the "right to live and work permanently anywhere in the U[nited] S[tates],"[474] to live among us until such time as he chooses to naturalize and become part of "us." There will be times when criminal conduct justifies rescinding that right—but our laws should ensure that deportation of lawful permanent residents be used only as a last resort when such "severity"[475] is truly warranted.

474. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEPARTMENT OF HOMELAND SECURITY, WELCOME TO THE UNITED STATES: A GUIDE FOR NEW IMMIGRANTS 8 (Sep. 1997), *available at* http://www.uscis.gov/files/nativedocuments/M-618.pdf.

475. PRESIDENT'S COMMISSION ON IMMIGRATION, *supra* note 425, at 198.